Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DENISE J. COFFEY, AN INDIVIDUAL; KARIE H. BROOKS, AN INDIVIDUAL, PETITIONERS

v.

SOUTHWESTERN BELL TELEPHONE, L.P., A TEXAS CORPORATION; SOUTHWESTERN BELL COMMUNICATIONS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit panel majority and the Trial Court held that in a RIF case, a multitude of circumstantial evidence that an employee performance evaluation was not performed in conformance with the stated RIF standards, all was categorized as "Plaintiff's subjective evaluation of his own performance" and since "it is only the manager's perception of the Plaintiff's performance that matters," Plaintiffs were thus deprived of consideration of that evidence to survive Employer's Motion for Summary Judgment. This decision excluded consideration of voluminous and substantial circumstantial evidence of the Employer's discriminatory motive in preparing the evaluations to be used for decisions in the RIF.

1. Whether or not the general rule giving deference to the Supervisor/Manager's perception of his/her employee's performance is so strong in a reduction in force ("RIF") case, that no amount of circumstantial evidence will give rise to an inference of pretext sufficient to prevent the granting of Summary Judgment in favor of the Employer on claims of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or the Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.?

2. Whether or not evidence showing that the employer inconsistently applied its reduction in force (RIF) criteria, along with evidence of other serious procedural irregularities in the RIF process is sufficient to support a finding of pretext adequate to survive Employer' Motion for Summary Judgment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et

seq. or the Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.?

3. Whether direct evidence that a Plaintiff's supervisor admitted to her that she was being surplussed during a reduction in force (RIF) because of her age such that the Employer's Motion for Summary Judgment is precluded, should also preclude the grant of summary judgment against co-Plaintiffs who hold the same level management position, were victims of the same RIF and discharged at the same time and/or discharged by the same supervisor?

4. Whether or not the employer's actions in deviating from, ignoring and changing the RIF criteria can in and of itself give rise to an inference of pretext sufficient to defeat Summary Judgment in a case based on violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or the Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.?

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The Tenth Circuit's Opinion & Order of October 15 2008 (06-5199) is officially reported a 544 F.3d 1101, (10th Cir, 2008) and is reproduced in the Appendix A.

The Opinion and Order of the United States District Court for the Northern District of Oklahoma denying Plaintiff's Motion for New Trial dated September 26, 2008 (NO. 03-CV-0452-CVE-FHM) is unofficially reported as 2006 WL 2796664 (N.D.Okla. Sep 26, 2006) and is reproduced in Appendix B.

The Opinion and Order of the United States District Court for the Northern District of Oklahoma granting Defendant's Motion to Dismiss the Plaintiffs' State law claims dated July 27, 2006 (NO. 03-CV-0452-CVE-FHM) is unofficially reported as 2006 WL 2128870 (N.D.Okla. Jul 27, 2006).

The Opinion and Order of the United States District Court for the Northern District of Oklahoma dated September 5, 2008 (NO. 03-CV-0452-CVE-FHM) granting summary judgment is unofficially reported as 2006 WL 2571889 (N.D.Okla. Sep 05, 2006) and is reproduced in Appendix C.

The Tenth Circuit's Opinion & Order of November 24, 2008 denying Motion for Rehearing is unreported, but designated in the Court as Case No. 06-5199 and is reproduced in Appendix D.

JURISDICTION

The District Court had jurisdiction pursuant to The district court had jurisdiction under 28 U.S.C. § 1331. The judgment of the court of appeals was entered on November 24, 2008. The petition for a writ of certiorari was filed on February 23, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS INVOLVED

28 U.S.C.A. Fed. Rules of Evidence. Rule 56.

Rule 401. Definition of "Relevant Evidence"

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Section 621(a) of 29 U.S.C.A. provides that:

> It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

Section 623(f) provides as follows:

> It shall not be unlawful for an employer, employment agency, or labor organization--
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no

such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act [29 U.S.C.A. § 631(a)] because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(Dec. 15, 1967, P. L. 90-202, § 4, 81 Stat. 603.)

Section 2000e-2 of 42 U.S.C.A. provides that:

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

....

(d) Training programs

It shall be an unlawful employment practice for

any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

....

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in

determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

....

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

....

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

> Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT

The Plaintiffs in this case were long-time employees of SBC Communications, Inc. (hereinafter "SBC"), employed as first-level managers in SBC's work group known as "Construction and Engineering – Oklahoma" (Oklahoma C & E") headed by Dan McNeely ("McNeely"). All three of the original Plaintiffs were female and over the age of forty, and they were each surplussed in a Reduction in Force ("RIF") in the Fall of 2002. First-level managers in Oklahoma C & E reported to their Area Managers, who in turn reported to Mr. McNeely. With the input of the Area Managers, McNeely determined that Oklahoma C & E had twenty-two first-level managers and one Area Manager more than its business needs required. The plaintiffs do not dispute the business necessity of the resulting RIF.

At SBC, when a RIF is conducted, the persons who are in the group that has been determined will be subject to lay-off are first given notice that they have been "surplussed." This means that they have 30 days to try to find another position in the company, and if they cannot do so then they are terminated. SBC Company policies require priority be given to qualified surplussed employees for positions that come open

during a RIF. McNeely's Team had gone through two previous RIFs in the Spring ('02) and Fall ('01) immediately preceding the subject RIF. The Guidelines and RIF Criteria developed by SBC for these RIFs were designed to address the immediate business-needs of the company that existed at the time, but the factors to be looked at and policies and procedures to be followed during the RIF were nearly identical from RIF to RIF. The Fall '02 RIF, unlike other RIFs at SBC, targeted first-line C&E managers in certain geographic areas of the state, but omitted other C&E first-line managers in other parts of the state. All three of the Plaintiffs were surplussed.

In the last few years, SBC had promoted and hired a number of younger male managers, and it was clear that this was the direction that McNeely (a third level manager) and his Area Managers (Second level) were headed with Team. The Fall '02 RIF accomplished the goal. In a department in which only 19 of 105 (18 %) managers were women, after the Fall '02 RIF only 7 of 81 (8.64%) managers remaining were female. Further, of the 23 surplussed managers only one (1) was under the age of forty. To the surprise of even one of the second-level managers, in this RIF many of the long-term experienced managers were surplussed in favor of inexperienced younger male managers.

Karie Brooks is a female and the oldest of the first-level managers at Oklahoma C&E. She had been an employee since 1982 and was initially promoted to a first-level manager position in 1992. Unlike any of the other first-level managers in this work group, Ms. Brooks had also been was promoted to a second-level

management spot in 1998. In order to move home to Oklahoma, however, she voluntarily accepted a demotion in 2000 to the position of Contract Coordinator in Oklahoma C&E.

Similarly, the non-appealing Plaintiff, Jamie Sanders an employee since 1980 became a first-level manager in 1991 and in February of 1997, Sanders transferred to the position of Manager – Engineering Design, which was her job position until she was surplussed. Sanders and Brooks were both supervised by the same second-level manager, Rick Wooten, who reported directly to McNeely.

The third Plaintiff, Ms. Denise Coffey had been with the company since 1976, but had worked in the field and was promoted to a first-level management position of Contract Coordinator in April of 2000. Ms. Coffey was recommended for the position by her previous manager, but reported to Area Manager, Mike Harris who reported directly to McNeely.

On the day the surplus was announced, Mr. Wooten called Sanders and Brooks into his office separately, gave them the required ADEA disclosure materials, and then told them that they were being surplussed because of their age, explaining that it was necessary to prevent age discrimination. Ms. Sanders asked Mr. Wooten repeatedly if it was her performance, and each time he assured her it was not and affirmed that it was only her age.

Sanders was able to find a position in Texas with the company, and worked there, away from her family, until she was forced to take medical leave from the

stress, mental and medical conditions that grew out of these circumstances.

Neither Brooks nor Coffey were able to obtain positions within the allowed time and their employment was terminated. The three Plaintiffs timely lodged their complaints with the EEOC and subsequently filed suit based on age and sex discrimination in violation of their rights afforded pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2 et seq and the ADEA, 29 U.S.C.A. §621(a) et. seq.

On Defendant's Summary Judgment Motion, the trial court found that Plaintiffs made their prima facie case of gender discrimination under Title VII, but found that there was "no evidence of pretext presented," specifically that:

a) the statistical evidence presented did not permit an inference of pretext because it failed to eliminate nondiscriminatory explanations for the disparate treatment, explained by the Court to necessitate a showing "that those laid off had lower rankings than those retained." App. 66a;

b) despite Defendants admissions that the rankings could not be verified with any objective evidence, the Plaintiffs' admissible evidence of manipulations of the guidelines, procedural irregularities in the rating (evaluation) **and** ranking (best to worse) stages of the RIF, and that SBC's decisions were justified by previously non-articulated and changing criteria (even post-litigation), finding that none of it was sufficient evidence of pretext because:

1) the Defendant's Affidavits, deposition testimony and employment evaluations rationalized the application of subjective ranking criteria, prompting the trial court to conclude that Plaintiffs "provided no evidence that the rankings were inconsistent with SWBT layoff procedures and have provided no evidence of intentional discrimination." App. 67a

2) the issues dealt with management personnel "exercising their discretion in employment decision" App. 67a-68a. The trial court essentially by classifying all of the evidence as "Plaintiffs' disagreement with their managers' assessments" concluded that "plaintiff 'cannot defeat summary judgment by claiming that she would have been retained if a different RIF criteria had been used.'" App. 68a.

The Court totally ignored Coffey's evidence and testimony of others regarding the discriminatory animus towards women by Harris and the manipulation of the RIF criteria by transferring the younger male managers into "safe" positions just prior to the Fall 2002 RIF.

As to the claims of ADEA age discrimination, the trial court likewise found Plaintiffs had established their prima facie case of age discrimination in that the record showed that plaintiffs were terminated despite the adequacy of their work performance and that SWBT retained managers younger than plaintiffs in the Fall 2002 RIF. However, the district court concluded that "an inference of discriminatory animus is unwarranted since Coffey's allegation of discriminatory

intent is undermined by the fact that the same supervisor who promoted her, terminated her," App 75a, ignoring completely Coffey's cooberating evidence and absolute denial that Harris was the one responsible for her promotion and hire as a manager at C&E, and obviously confusing the documentation of sexual animus and sexually derogatory comments by Harris as being presented to support a claim under ADEA.

The trial court did not acknowledge that Wooten made the same statement to Brooks as he did to Sanders regarding age as the reason for their being surplussed, but even more damaging, the trial court attempted to convert the direct evidence into circumstantial evidence by stating that "given the different versions of this conversation between Wooten and Sanders, this evidence is at most circumstantial." App. 79a (fn 10) The Trial Court also ignored the fact that all but one of the Managers lied in their testimony about discussing age in the ranking meetings. The sketchy notes of the ranking meetings showed that indeed the Area managers did discuss which of their employees were pension eligible. Finally, the trial Court refused to look, or at least did not address or analyze the circumstantial evidence that cast grave doubt on the validity (procedural irregularities) of the rating (Band Placement) process instituted in the Fall 2002 RIF. Nor did the Trial Court evaluate and/or address any of the abundant evidence presented by Plaintiff's which provided proof that had SBC's objective RIF criteria actually been used to compare the "performance, experience, skills and training" (the RIF criteria) as it related to the Plaintiffs and the younger, less experienced male managers who were not

surplussed in the RIF, the result would necessarily been different.

The Majority panel of the Court of Appeals for the 10th Circuit affirmed the trial courts dismissal of all substantive claims of the Plaintiffs other than Sander's age discrimination claim which was supported by Wooten's statement to Sanders that age was the reason she was surplussed, finding it to be direct evidence of discrimination in this RIF as to Sanders age claim only. The Court noted that despite SWBT's evidence calling Sanders memory into question, that issue was for a jury to decide. App. 7a-8a.

Curiously, however, neither the Trial Court nor the Court of Appeals acknowledged that the **same statement** had been made by Wooten to Ms. Brooks. *See* Additional Fact #39 (with citations) in *Plaintiffs Combined Response to Motion for Summary Judgment.* Both Courts failed to treat the direct evidence appropriately, since even if the statement had only been made to Sanders, it is still direct evidence of discrimination made by the same supervisor to a first-line manager in the same RIF at the same time and should have been applied to all that suffered from age discriminatory acts of the Defendants. This kind of "me too" evidence is clearly admissible under the circumstance at hand. Had the Courts below acknowledged it as such, all three of the Plaintiffs cases would have survived the granting of Summary Judgment. The Court of Appeals also reversed the Trial Court on an issue not before this Court dealing with the Court's dismissal of SBC Communications, Inc. without notice to the Plaintiffs.

In the Fall 2002 Lay Off, the RIF criteria in the Management Staffing Guidelines (MSG) and a hand-out given to the Area Managers expounding the criteria the Area managers should utilize in the ranking (worst to best) process after having done the Band Placement from those 2002 scores.

Judge McKay concurred in part with the Majority in that he stayed away from the rating stage (Band Placements) involving performance evaluations, but he also dissented in part, finding that an analysis of the abundance of circumstantial evidence provided adequate pretext evidence as required in a RIF from which a jury could conclude that the real motivation was discriminatory. After looking at the balance of the circumstantial evidence, including evidence of sexual animus by Mike Harris, Judge McKay concluded that in addition to going forward with Sanders age claim based on direct evidence that she should be able to proceed with her sexual discrimination case as well. He further concluded that Denise Coffey should, under the applicable standard, be able to proceed on both claims having presented adequate circumstantial evidence of Pretext.

Judge McKay found several major problems with the Fall 2002 RIF citing particularly SBC's practice of selectively applying its own documented RIF Criteria, combined with the consistent use of RIF Criteria which had previously been undocumented. Judge McKay would have found that this could have created sufficient evidence of pretext, considering the totality of the circumstance. Citing another method of finding pretext, Judge McKay would have found that Ms. Coffey's claims should have been allowed to

proceed since there was evidence that her Evaluation under Defendant's own RIF requirements may have been intentionally or deliberately falsified or manipulated. Her supervisor, Mike Harris was responsible for assessing her performance and McKay found that Coffey had clearly presented evidence of animus on his part.

REASONS FOR GRANTING THE PETITION

Plaintiffs and their lawyers alike are entitled to some measure of predictability about the outcome of an employment discrimination battle, but the likelihood of being able to give sound advice or know whether or not the there is a possibility for success becomes less and less probable as long as the Circuit Courts continue to create exceptions to the application of the principles which are clearly announced by this Court.

Despite the fact that this Court intended to resolve the issues regarding what is enough evidence for a reasonable fact finder to reject the employers nondiscriminatory rationale for its decision in *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 120 S.Ct. 2097 (2000), the 10th Circuit in the case at hand has found a way to bundle up and ignore substantial evidence of documented facts showing that McNeely's Oklahoma C&E group intended to shape the face of its workforce in to a younger male profile. Both the Trial Court and the majority panel of the Court of Appeals categorized it as the Employee's opinion as to her own value and made it go away. The Court of Appeals statement that an employee "can't defeat a Motion for Summary Judgment by saying that she would have been retained if the RIF criteria was different" is

disingenuous in this case. (App. 11a) None of the Plaintiffs in the case asserted that the RIF criteria had to be different for them to be treated fairly or have an equal chance. Rather, these Plaintiffs, after having been told directly why they were terminated, sought out the company policy (RIF Criteria) for legitimate considerations that *should have been used* in the RIF decisions. The Plaintiffs, having spent a combined 37 years in management at SBC, recognized the fact that this particular RIF was simply not being conducted in accordance with the normal standards by which SBC managers are bound. Once Plaintiffs obtained the desired evidence, they were able to show piece by piece that the RIF criteria were not followed or certainly not applied fairly to them.

At the Summary Judgment stage, that yet another group of excuses were set out to justify the employment decisions. Judge McKay identified some 12 categories of "undocumented criteria" and one category of documented criteria to explain "why twelve of Ms. Sanders peers, four of whom were younger and male, six of whom were older and male, and two of whom were younger and female, were ranked ahead of her." App. 28a

Judge McKay stated:

> In my view, using criteria not listed on the ranking considerations sheet and not considering all three content areas as instructed constituted a deviation from the RIF criteria "supposedly employed. (citation omitted). I conclude then Defendant then applied its chosen RIF criteria selectively. App. 28a

Judge McKay found evidence of procedural irregularities in respect to the topic of age being discussed at the ranking meetings, which showed the falsity of the Area Manager and McNeely's previous testimony as well as bring the topic of age into the consideration. The legitimate non-discriminatory reason articulated had nothing to do with pension plans or benefits, just reduction in force. Judge McKay also found that SBC had changed its explanation for its decisions after significant legal proceedings had occurred, App. 24a, creating another inference of falsity.

Following the guidelines set by his own Court in *Beaird v. Seagate Technology, Inc.* 145 F.3d 1159 (10th, 1998) in his Dissent Judge McKay actually analyzed a great deal of the circumstantial evidence that was presented by Plaintiffs Sanders and Coffey and finding it sufficient for both of them to proceed with their age and sex discrimination claims. App. 25a

This leaves one to wander why Judge McKay, the majority panel and the Trial Court all refused to give the substantial evidence presented by Plaintiff Brooks the same consideration. This brings us to the Question presented: Whether or not the general rule giving deference to the Supervisor/Manager's perception of his/her employee's performance is so strong in a reduction in force RIF case, that no amount of circumstantial evidence will give rise to an inference of pretext sufficient to prevent the granting of Summary Judgment in favor of the Employer on claims of discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or the Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.?

The refusal of either Court to acknowledge that the Statement made to Brooks by her supervisor was direct evidence of discrimination is inexplicable, but even with that, Brooks presented a prima facie case, showed clear irregularities in her performance evaluation in violation of Management Guidelines for the same[1] is inexplicable. But Brooks went further and submitted evidence that the Band Placement decision was ludicrous in light of the RIF Criteria.

The Majority (Judge Tacha and Tymkovich) analyzed the circumstantial evidence based on Plaintiffs claims in four areas:

> (1) their qualifications did not warrant their placement in Band C; (2) SWBT inconsistently applied its ranking criteria; (3) an Area Manager was permitted to take voluntary demotion that resulted in Ms. Sanders job loss; and (4) women and older employees were disproportionately affected by the RIF.

As the Court analyzed the first issue of Band Placement, it based its analysis on the faulty assumption "It is undisputed, however, that SWBT determined band placement on an employee's most recent performance evaluation:" App 10a. But as pointed numerous times in the Appellants' Combined Response and throughout the entirety of the Appellant's Reply Brief (beginning on p. 2):

---

[1] The fact that she was unable to have her promotability considered or her achievements for the past year putting her on the same level with 2 year managers is certainly an irregularity.

> The Plaintiffs presented evidence of severe discrepancies and irregularities which occurred 1) in the preparation of *the 2001 evaluations... on which all subsequent RIF ratings and rankings were based...* 2) in the ratings (grouping into Bands) which had no rational relationship to the objective standards claimed:
>
> > performance, experience, skills and training, and 2) the rankings process in which names were moved around by managers based on factors other than the Management Staffing Guidelines and Mr. McNeely's Ranking Considerations.

So the most recent evaluation for the employees were NOT the 2001 evaluation. McNeely admitted that since they had just used them in the last two RIFs, he told his Area Managers:

> I asked the eight Area Managers... to individually rate the Performance of all of the 104 first-level managers reporting to them regardless of whether the manager was in an affected work group. These performance ratings were used to determine the band assignments of the 93 managers in the affected work groups. Because we had just conducted a surplus a few months earlier, the Area Managers were forwarded as their starting point the performance ratings they had assigned the managers the previous Spring 2002 layoff.

[App/20, p. 0227, ¶12]

The Spring 2002 **performance ratings** were indeed based on the 2001 performance evaluations which were by then... NOT the most recent performance evaluations and evaluations which were clearly fraught with serious procedural irregularities for both Brooks and Coffey. For example, Brooks Supervisor **refused** to allow her to follow the Management Guidelines on preparation of her 2001 Evaluation announcing that the fact she kept up with all of her accomplishments and the new managers had not would be unfair to those young male managers, and instead gave them all the same evaluation scores. Reply Brief, p. 10-11. The result of this manipulation was that Brooks' promotability and outstanding performance were not included, she was placed in Band C and her only competition, Eddie Root was placed in Band B. On pages 10-17 of Appellant's Reply Brief, the MSG guidelines and McNeely's instructions to his Area Managers on how to prepare those "Spring 2002 performance ratings" designating points for certain accomplishments in each of the four RIF criteria area are set out in detail. Performance was the criteria from which they started with the 2001 Evaluations... with "C" Band give 20 points and "B" Band given 30 points. Then, the Area Managers were instructed to add in points for **Skills,** points ranging from 0-10 points with anyone who has been on the promote list getting the full 10 points. For **Experience**, those with more than 15 years experience as a manager would get 10 points and those with with less than 15 years would only get 5 points. For **Training,** those with a Phd or Masters were given 25 points, 20 points for those holding a Bachelors, 10 points for an Associates degree and only 5 points if they did not have any degree. So, despite the Trial Court and the Majority's conclusion that

Plaintiff's challenge to the Band Placement would obviate the managers discretion in performance evaluation and place the employees opinion of his own work over that of the Managers perception of the Employees performance, it simply does not. Even if Ms. Brooks accepts the 2001 Performance Evaluation, the designations on the evaluation form would give her 20 points, and give Eddie Root 30 points. After that, however, the analysis of the 2002 Performance Evaluation was totally objective and set out in detail in McNeely's Affidavit and discussed at length in Appellants Reply Brief in the 10th Circuit, pages 24-26, as follows:

> 1) Karie Brooks was 56 years old at the time of the surplus. Her objective factors included:
> •Performance: her performance (productivity of $651,1009) was 4th highest;
> •Experience: Brooks had only been an engineer since 2001 [job related experience] +5;
> •Skills: . A possible 0-10 were assigned for management skillsand Brooks had been a manager over 14 years +10; An additional 5 points was given to managers with technical skills above and beyond those required by the job and Brooks had also served as a Second-Line Manager prior to coming to Oklahoma +5. Further, at the time that this Spring 2002 evaluation was prepared, Brooks would have still been on the promote list since promotion recommendations are for a one year period and her recommendation was given in May 2001 [App/77]+ 10.
> •Training: Brooks had her Bachelors degree +25

2) Eddie Root, however and despite the Trial Court's arguments about these facts:

•Performance: his performance (productivity of $470,100 was less than Brooks.

•Experience: Root had one year more Engineering experience than Brooks, but they were both at the same point level as this [job related experience] +5;

•Skills: . A possible 0-10 were assigned for management skills but Root had only been a Manager since 2000; An additional 5 points was given to managers with technical skills above and beyond those required by the job, but there is no indication of this in his records, and there was no indication that he was on the promote list at that time so would not get extra points for this. -0-

•Training: Finally, Root had no degree. -0-

Thus, Karie Brooks on the 2002 Performance Evaluation which was allegedly used for Band Placement in the Fall 2002 RIF, starting out with 20 points for not having special wording subjectively placed on her 2001 evaluation, but would get an additional 55 points for a total of 75 points. While Eddie Root got 30 points for his subjective evaluation he only earned an additional 5 supplemental points for a total of 35 points. Root was a 46 year old male and Brooks was a 56 year old female (the oldest of all of the first level managers at Oklahoma C&E). Thus, the Court of Appeals agreement with the Trial Court that Band Placement in this case involved interfering with the Employer's judgment, was simply misplaced. This does not take into account the many other discrepancies enumerated in Plaintiffs papers.

Despite the Courts hesitancy in this case to analyze this evidence at the performance evaluation stage, the 10th Circuit's own cases create a standard for overcoming the onerous burdens in of proving discrimination in a RIF case. In *Beaird v. Seagate Technology, Inc.*145 F.3d 1159 (10th Cir., 1998) the 10th Circuit held:

> First, she can argue that her own termination does not accord with the RIF criteria supposedly employed. In this case, certain appellants contend that had employee potential been considered according to the employer's own RIF formula, they would have been retained. This kind of evidence can in some cases suffice to substantiate pretext. See *Christie v. Foremost Ins. Co.*, 785 F.2d 584, 586-87 (7th Cir.1986) (holding that failure of defendant to comply with its own RIF policy allowed jury to conclude RIF was pretextual). But minor inconsistencies in the application of RIF criteria may be too insubstantial to allow a reasonable jury to infer that the RIF was pretextual. See *Lucas v. Dover Corp.*, 857 F.2d 1397, 1402 (10th Cir.1988).
>
> Second, a plaintiff can adduce evidence that her evaluation under the defendant's RIF criteria was deliberately falsified or manipulated so as to effect her termination or otherwise adversely alter her employment status. See, e.g., *Gustovich v. AT & T Communications, Inc.*, 972 F.2d 845, 848 (7th Cir.1992) ("To make progress, the plaintiffs had to come up with evidence implying that the performance evaluations had

> been 'cooked' in order to do in the older workers."). All the appellants in this case make claims of this kind. One method of demonstrating manipulation or falsification of evaluation is to produce evidence that a supervisor responsible for assessing her performance displayed ageist animus.

Unfortunately when presented with the evidence which would fit all of the methods for overcoming Plaintiff's burden, the majority panel instead abstained.

Direct Evidence

It is obviously important for this Court to also clarify its position on the use of direct evidence. Does a RIF require direct evidence to prevail? The Trial Court in this case attempted to convert direct evidence to circumstantial evidence by reclassifying it as such simply because the other side conjured up doubt about the Plaintiff's memory of the conversation. While the Court of Appeals disallowed that to happen, it is still unclear why that evidence was not enough to provide support for rejecting Summary Judgment in all of the Plaintiffs' cases. In considering the issue of Direct Evidence, the Question raised herein is: Whether direct evidence that a Plaintiff's supervisor admitted to her that she was being surplussed during a reduction in force (RIF) because of her age such that the Employer's Motion for Summary Judgment is precluded, should also preclude the grant of summary judgment against co-Plaintiffs who hold the same level management position, were victims of the same RIF and discharged at the same time and/or discharged by the same supervisor?

The Circuits are obviously split on this issue. In *Huff v. UARCO, Inc.*122 F.3d 374 (7th Cir, 1997), at p. 386, the Court held that

> Moreover, "evidence of the decisionmaker's discriminatory motive regarding one employment decision may be used as evidence of that decisionmaker's discriminatory motive in making a similar employment decision." *Burns v. Gadsden State Community College,* 908 F.2d 1512, 1518-19 n. 9 (11th Cir.1990). As with the so-called stray remarks, UARCO's treatment of other workers in similar circumstances is probative of UARCO's intent with regard to Schoolman and Huff in an indirect proof case. Again, we do not think this piece of evidence alone is enough to overcome summary judgment, but in combination with plaintiffs' other evidence, it is enough to give plaintiffs their respective days in court.

The first Circuit also held in *Hodgens v. General Dynamics Corp.* 144 F.3d 151, 171 (1st Cir, ,1998) that statements by supervisors carrying the inference that the supervisor harbored animus against protected classes of people or conduct are clearly probative of pretext, *Kelley v. Airborne Freight Corp.*, 140 F.3d 335, 347-48 (1st Cir.1998) (Remark that it would be a good time "to get rid of some of the older mediocre managers" had a "direct bearing on age discrimination."); *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 746 (7th Cir.1994) (Comment by supervisor that the plaintiff's "accounts could use some younger blood" constituted sufficient direct evidence of discriminatory intent.); *Lindahl v. Air France*, 930 F.2d 1434, 1439 (9th

Cir.1991) (Sexist comments reflecting the supervisor's stereotypical images of men and women raised a genuine issue of fact with respect to pretext.); *Morgan v. Arkansas Gazette*, 897 F.2d 945, 951 (8th Cir.1990) (City circulation manager's statements that the plaintiff was "an old fuddy-duddy" constituted direct evidence that the defendant's reason for discharging the plaintiff was a pretext for age discrimination.), even if that inference is not the only one that could be drawn from the comment, *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 192-93 (2d Cir.1991) (Statement that plaintiff was overqualified for position raised an issue of material fact with regard to pretext in an age discrimination case.).

But the 11th Circuit in *Rowell v. BellSouth Corp.*433 F.3d 794. 800 (11th Cir, 2005) found that on motions for summary judgment, the Court should consider only that evidence which can be reduced to an admissible for, citing *Macuba v. Deboer*, 193 F.3d 1316, 1324-25 (11th Cir.1999) which held that although evidence that is otherwise admissible may be accepted in an inadmissible form at summary judgment stage, hearsay could not be reduced to admissible.

Courts that have admitted statements of managers under Rule 801(d)(2)(D) where there is some evidence that the statements reflected some kind of participation in the employment decision or policy of the employer include the 8th Circuit and the 1st Circuit, *Yates v. Rexton, Inc.*, 267 F.3d 793 (8th Cir.2001); *Woodman v. Haemonetics Corp.*, 51 F.3d 1087 (1st Cir.1995), but the 11th Circuit, like the 10th continues to find ways to exclude this telling sort of evidence.

The first Circuit in *Cruz-Ramos v. Puerto Rico Sun Oil Co.* 202 F.3d 381, 385 (1st Circuit, 2000) in looking at others ability to use such evidence stated:

> Our last comment addresses the appellant's reliance on a statement contained in his deposition, submitted as part of his opposition to Sun's motion for summary judgment. In it, he vouchsafed that, at about the time of the reduction in force, he asked the manager of the department in which he worked, Henry McLeod, why he was being furloughed. According to the appellant, McLeod told him "that they had to get rid of one supervisor, and that because I was the one less affected by a discharge, since due to my age and years of service I qualified for early retirement, they selected me.
>
> Consistent with the summary judgment standard, we accept, arguendo, that McLeod made the comment. Unlike the district court, we would not characterize it, strictly speaking, as a stray remark because McLeod (the department head and a member of the team that rated the seven aspirants) was one of the decisionmakers and his comment directly addressed the challenged employment decision. See *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 582 (1st Cir, 1999). But for purposes of this case, the most that can be extracted from McLeod's statement is that the rankings may have been motivated by considerations of retirement eligibility. Although factoring pension status into the decisional mix in a reduction-in-force situation may seem unfair, it is not probative of

age discrimination. As a matter of federal law, employment decisions sparked by factors other than age, such as pension status, do not prove age discrimination even though such factors correlate with age to some extent. See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611-12, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (explaining that an employment decision based on pension status "would not be the result of an inaccurate and denigrating generalization about age "); accord *Broaddus v. Florida Power Corp.*, 145 F.3d 1283, 1287 (11th Cir.1998); *Bramble v. American Postal Workers Union, Providence Local*, 135 F.3d 21, 25-26 (1st Cir.1998); *Hanebrink v. Brown Shoe Co.*, 110 F.3d 644, 647 (8th Cir.1997). This is but another iteration of the settled principle that "[t]he ADEA does not stop a company from discharging an employee for any reason (fair or unfair) or for no reason, so long as the decision to fire does not stem from the person's age." *Mesnick v. General Elec. Co.*, 950 F.2d 816, 825 (1st Cir.1991).

CONCLUSION

The intricate maze of requirements which have developed around a Plaintiff's ability to present evidence showing that their employer was discriminating against them has become so thick that only a few could possibly navigate it successfully. In this day and age we would all like to believe that discrimination no longer exists in the work force. But as one who has had to avoid answering the phone lest I get involved in another six year case and have to abandon forever my dreams of retirement, my staff and

I can attest that it not only exists, it thrives in some parts of the work force. And while the Courts must have standards that in some way limit or give it control over its caseload, it is sad that this particular area of law... the enforcement of our most basic Civil Rights has developed so many road blocks that only the few can actually afford the time, money and energy that is required to obtain relief in this area.

Summary Judgment is one of the tools our legal system has developed as a gate keeping mechanism to the desired remedies that litigants seek. Explaining that it is the Plaintiffs burden to show that there are genuine issues of material facts before your client gets the opportunity of having their peers decide whether they were wronged is sometimes difficult, but most understand the logic eventually. When Plaintiffs, however, as the ones in this case, go to great lengths and expense, working long hours tracking down the truth in order to refute each and every new reason that their employer can conjure up in the next pleading in order to have the right to do so and are then faced with a Court, not a jury, that tells them that no reasonable human would ever believe that the mounds of evidence gathered to meet their burden , the explanation is not only not logical it begins to sound false itself. In this case, it matters little whether this Court determines that Judge McKay arrived at a "correct" interpretation of the evidence and its inferences -- what does matter, quite simply, is not only could reasonable persons disagree, reasonable jurists could, and did disagree. Under these circumstances, the grant of summary judgment was simply ludicrous. Judge McKay is a reasonable jurist. Because he could read the evidence -- interpreted in accordance with the precedential

authority as creating a triable issue of fact, the denial of summary judgment is required. It was error for the majority to conclude, as they inherently MUST have concluded, that all reasonable jurors would be compelled to reach the same conclusion about such voluminous evidence. The majority's position -- that but a single inference could be drawn from the evidence, and only a single conclusion reached -- is the correct position ONLY if the inferences drawn and conclusions reached by Judge McKay were entirely unreasonable. Summary Judgment is a process that must be examined, and the fact that it dominates the area of civil rights law imparticularly is even more reason that the standards must be loosened. That Judge McKay's conclusions and inferences were NOT unreasonable is demonstrated by the fact that other reasonable jurists have also concluded the same when faced with similar facts.

Respectfully Submitted,

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No. 06-5199
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMIE K. SANDERS, an individual; DENISE J. COFFEY, an individual; KARIE H. BROOKS, an individual,
Plaintiffs - Appellants,
v.
SOUTHWESTERN BELL TELEPHONE, L.P., a Texas corporation; SOUTHWESTERN BELL COMMUNICATIONS,
Defendants - Appellees.

October 15, 2008, Filed

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA. (D. Ct. No. 4:03-CV-00452-CVE-FHM).

COUNSEL: N. Kay Bridger-Riley, Bridger-Riley & Associates, P.C., Tulsa, Oklahoma, for Plaintiffs-Appellants.

Mary L. Lohrke (Kimberly Lambert Love with her on the brief), Titus, Hillis, Reynolds, Love, Dickman & McCalmon, Tulsa, Oklahoma, for Defendant-Appellee.

Before TACHA, McKAY, and TYMKOVICH, Circuit Judges.

TACHA, Circuit Judge.

Plaintiffs-Appellants Jamie Sanders, Denise Coffey, and Karie Brooks appeal the district court's entry of summary judgment in favor of Defendant-Appellee Southwestern Bell Telephone, L.P. ("SWBT") on their claims of age and sex discrimination. They also appeal the court's dismissal of co-defendant Southwestern Bell Communications ("SBC") for improper service. We have jurisdiction under 28 U.S.C. § 1291, and we AFFIRM in part and REVERSE in part.

I. BACKGROUND

SWBT experienced a significant loss in customers after September 11, 2001. As a result, SWBT's Oklahoma Construction and Engineering ("C&E") organization underwent three separate reductions in force ("RIFs") of first-level managers. The RIFs were conducted in the fall of 2001, spring of 2002, and fall of 2002. The plaintiffs survived the first two RIFs but not the third, which is the only RIF at issue in this appeal.

Dan McNeely headed the Oklahoma C&E organization during the fall 2002 RIF. First-level managers in the Oklahoma C&E organization reported to their Area Managers, who in turn reported to Mr. McNeely. In the fall of 2002, SWBT determined that the Oklahoma C&E organization had twenty-two first-level managers and one Area Manager more than business needs required. The plaintiffs do not dispute the business necessity of the resulting RIF.

SWBT's Management Staffing Guidelines ("MSG") set forth procedures for conducting RIFs. As part of the fall 2002 RIF, and in accordance with the MSG, all first-level managers in the Oklahoma C&E organization

were first grouped by job title and work location. Mr. McNeely, with input from the Area Managers, then determined the geographic areas where a smaller number of managers could handle the existing workload. The groups with surplus workers, or "affected work groups," included Managers-Engineering in the Oklahoma City/Stillwater area, Managers-Construction in the Oklahoma City/Stillwater area, and Managers-Engineering in the Enid area.

To determine which managers would be selected for the RIF, and consistent with the MSG, managers in each affected work group were placed into one of four "bands"--Bands A, B, C, and D--based on their most recent performance evaluations. Band A was the highest; Band D was the lowest. No manager within any affected work group, however, fell into Band D.

Next, five Area Managers ranked all Band C managers in each affected work group against one another. Those managers who ranked lower than the number of managers designated for retention in the affected work group were considered to be "at risk" for a layoff, or "surplus." The highest-ranked at-risk manager, however, could be "saved" from being laid off if a higher-ranked manager in her affected work group either voluntarily quit or accepted a job in a non-affected work group, or a different organization within the company.

As a Manager-Engineering in the Oklahoma City/Stillwater area, Ms. Sanders fell into an affected work group. She was placed into Band C based on her 2001 performance evaluation. Sixteen other people in

this affected work group were also placed into Band C. The five Area Managers ranked Ms. Sanders fifth from the bottom. Because only four managers were designated as surplus, Ms. Sanders was not considered to be at risk at that time. Later, however, and pursuant to the MSG, one Area Manager accepted a voluntary demotion to Manager-Engineering. This demotion necessitated the layoff of an additional manager from this affected work group, which caused Ms. Sanders to be at risk for surplus. [1]

Ms. Coffey's position was in the affected work group consisting of Managers-Construction in the Oklahoma City/Stillwater area. Her most recent performance evaluation placed her in Band C. The Area Managers ranked Ms. Coffey last out of the six people in Band C, which put her at risk of being surplussed. [2]

Ms. Brooks was one of two people in the affected work group consisting of Managers-Engineering in the Enid area. She was placed in Band C; the other manager, a younger man, was placed in Band B. Because it had previously been determined that one person in this work group would be laid off, Ms. Brooks was considered at risk.

On November 13, 2002, Ms. Sanders and Ms. Brooks met individually with their supervisor, Area Manager Rick Wooten. Ms. Coffey met with her supervisor, Area Manager Mike Harris. The supervisors informed the plaintiffs that their positions were being eliminated or consolidated with another position, and gave them the option of either terminating their employment immediately or staying on for thirty days to apply for other positions within the company. According to Ms.

Sanders, Mr. Wooten told her during this meeting that she was being surplussed because of her age.

Ms. Sanders ultimately accepted another position with SWBT in Plano, Texas. Ms. Coffey and Ms. Brooks were unable to locate another position and were laid off in December 2002. Ms. Sanders was forty-eight years old, Ms. Coffey was forty-five, and Ms. Brooks was fifty-six.

The plaintiffs filed suit against SWBT and SBC, alleging that they were surplussed because of their age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, and because of their sex in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. After discovery, SWBT and SBC moved for summary judgment. Before ruling on the motion, the district court sua sponte dismissed SBC for insufficient service of process. The court then granted summary judgment in favor of SWBT, reasoning that the plaintiffs had failed to demonstrate that SWBT's nondiscriminatory justification for their layoffs was pretextual. The plaintiffs appeal the order of summary judgment and the dismissal of SBC. [3]

II. SUMMARY JUDGMENT

A. Standard of Review

We review summary judgment decisions de novo, applying the same legal standard as the district court. *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving

party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Simms*, 165 F.3d at 1326.

B. Proof of Discrimination

A plaintiff alleging discrimination may prove her case by direct or circumstantial evidence. *See Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000). Direct evidence is evidence from which the trier of fact may conclude, without inference, that the employment action was undertaken because of the employee's protected status. *See Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir. 2007) ("Direct evidence is evidence, which if believed, proves the existence of a fact in issue without inference or presumption.") (quotations omitted). For example, we have stated that an employer's policy, discriminatory on its face, is direct evidence of discrimination. *See Ramsey v. City and County of Denver*, 907 F.2d 1004, 1007-08 (10th Cir. 1990).

Usually, however, a plaintiff will not have direct evidence of discrimination and will establish her claims through circumstantial evidence. In that instance, we analyze the plaintiff's claims under the *McDonnell Douglas* framework to determine whether the defendant is entitled to summary judgment. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Adamson v. Multi Community Diversified Servs., Inc.*, 514 F.3d 1136, 1145-46, 1148 (10th Cir. 2008) (applying *McDonnell Douglas* to discrimination claims brought pursuant to

the ADEA and Title VII). Under the *McDonnell Douglas* analysis, a plaintiff "bears the initial burden of setting forth a prima facie case of discrimination." *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 531 (10th Cir. 1998). After the plaintiff makes a prima facie case, the burden shifts to the employer to give a legitimate, nondiscriminatory reason for its employment decision. *See Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997). "If the employer comes forward with a nondiscriminatory reason for its actions, the burden then reverts to the plaintiff to show that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual--i.e., unworthy of belief." *Id.* (quotations omitted). A plaintiff who demonstrates pretext gets "over the hurdle of summary judgment." *Id.*

1.

Ms. Sanders has produced direct evidence that she was surplussed because of her age. She testified that Mr. Wooten, who had been part of the team responsible for ranking her fifth from the bottom among Band C managers in her affected work group, told her that her age--not her job performance--was the cause of her surplus.

It is undisputed that when Mr. Wooten informed Ms. Sanders that her job was being eliminated, he provided her with a document that listed, by job title and age, the number of employees selected for layoff and the number who were being retained. This information is required to be given to employees by the Older Workers Benefit Protection Act, which is part of the ADEA. According to Ms. Sanders, however, and

contrary to the purpose of the ADEA paperwork, Mr. Wooten pointed to the document, explained that she was being surplussed because of her age, and stated that this was necessary to prevent age discrimination.

Although SWBT has put forth evidence that calls Ms. Sanders's recollection of events into question, it is not our province at the summary judgment stage to weigh the evidence or make credibility determinations. *Utah L'house Ministry v. Found. for Apologetic Info. & Rsch.*, 527 F.3d 1045, 1050 (10th Cir. 2008). If the jury believes Ms. Sanders's testimony, it could conclude--directly, without the aid of any favorable inferences--that the reason for her surplus was her age. Accordingly, SWBT is not entitled to summary judgment on Ms. Sanders's age-discrimination claim. [4]

2.

The plaintiffs' remaining claims are supported by circumstantial evidence and therefore must be analyzed under *McDonnell Douglas*. As to these claims, we agree with the district court that the plaintiffs have established prima facie cases of both sex discrimination and age discrimination.[5] We also agree with the district court that SWBT has articulated a legitimate, non-discriminatory reason for the plaintiffs' surplus: the RIF. The central issue in this appeal, then, is whether the plaintiffs have provided evidence of pretext. We conclude they have not.

Generally, "[a] plaintiff demonstrates pretext by producing evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate

reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1308 (10th Cir. 2005) (quotations omitted). When the employer's proffered reason for its action is a RIF, evidence tending to show that the RIF is merely a pretext for the plaintiff's surplus may take several forms. First, the evidence may demonstrate that the plaintiff's surplus is inconsistent with the RIF criteria articulated by her employer. *See Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1168 (10th Cir. 1998); *see also Sanchez v. Philip Morris Inc.*, 992 F.2d 244, 247 (10th Cir. 1993) ("It is conceivable that a plaintiff . . . could be so overwhelmingly better qualified than another applicant that on this evidence alone a trial court could properly find pretext"); *Beaird*, 145 F.3d at 1169 (citing *Sanchez* for the proposition that "[t]here may be circumstances in which a claimed business judgment is so idiosyncratic or questionable that a factfinder could reasonably find that it is pretext for illegal discrimination."). Relatedly, evidence showing that the employer inconsistently applied its RIF criteria may also support a finding that the plaintiff was terminated for discriminatory reasons. *See Beaird*, 145 F.3d at 1173-74. Other procedural irregularities in the RIF process may similarly evince unlawful discrimination. *See Whittington v. Nordam Group Inc.*, 429 F.3d 986, 994 (10th Cir. 2005). This, of course, is not an exhaustive list of the types of evidence that may support a finding of pretext, and we do not limit a plaintiff to any particular method of proof. Rather, when assessing whether a plaintiff has demonstrated pretext such that a jury could conclude that discrimination was the true reason for the adverse

employment action, we consider the evidence as a whole. *See Danville v. Reg'l Lab Corp.*, 292 F.3d 1246, 1250 (10th Cir. 2002).

We understand the plaintiffs in this case--either individually or together--to argue that the RIF was only a pretext for unlawful discrimination because: (1) their qualifications did not warrant their placement in Band C; (2) SWBT inconsistently applied its ranking criteria; (3) an Area Manager was permitted to take a voluntary demotion that resulted in Ms. Sanders's job loss; and (4) women and older employees were disproportionately affected by the RIF.

Band Placement

Ms. Sanders and Ms. Brooks contend that SWBT was not justified in placing them in Band C based on their performance and qualifications relative to employees who were placed in higher bands. It is undisputed, however, that SWBT determined band placement based on an employee's most recent performance evaluation; that a notation on the performance evaluation from the employee's manager stating that the manager "concur[s] with [the employee's] accomplishments as written or the achievements as documented" was viewed by the Area Managers as demonstrating average performance warranting placement in Band C; and that the performance evaluations of Ms. Sanders and Ms. Brooks contained this notation. Unlike the evaluations of managers who were placed in Band A or Band B, neither of these plaintiffs' evaluations included comments from their supervisors indicating their performance was "superior or "above average as compared to his/her peers." To the

extent these plaintiffs contend that they are more qualified or for other reasons should have been placed in a higher band, we have held that "[i]t is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his own relative performance," *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 988 (10th Cir. 1996), and that a plaintiff "cannot defeat summary judgment by claiming that she would have been retained if different RIF criteria had been used." *Beaird*, 145 F.3d at 1169. Thus, the plaintiffs' claims on this point are not sufficient to demonstrate pretext.

Because this is Mrs. Brooks's only argument on pretext, we affirm the district court's entry of summary judgment on both her age and sex discrimination claims. Further, because Ms. Coffey was the youngest person in the construction group's Band C, and because there is no evidence that her band placement was determined by her age, we affirm the district court's entry of summary judgment on her age discrimination claim.[6] Thus, the only remaining claims are Ms. Sanders's and Ms. Coffey's sex discrimination claims.

Inconsistent Application of RIF Criteria

Ms. Sanders argues that the Area Managers did not consider RIF criteria uniformly when they were determining employees' rankings within Band C of her affected work group. We have stated that the selective use of RIF criteria--to evaluate some employees' potential but not others', for example--"constitutes limited evidence of pretext." *Beaird*, 145 F.3d at 1174. The record, however, does not support Ms. Sanders's assertion.

SWBT policy, as articulated by the MSG, is to rank employees subject to the RIF (in this case, those falling into Band C) according to their "performance, skills, experience, and training." In addition, Mr. McNeely circulated a guide to his Area Managers that listed subsets of the MSG categories. For "skills," the guide listed "management skills," "technical skills," "supervisory skills," "effectiveness with others," "ability to handle a broader scope," and "promotional possibility." *Id.* Mr. McNeely also stated in his affidavit that the skills category included consideration of skills "above and beyond those required for the job." Similarly, Area Manager Mike Harris testified that "skills would be the things that you had that made you capable of doing your job, [including] any cross-experience that you might have." As to the MSG's other two ranking categories, Mr. McNeely's memo stated that the "experience" category encompasses "NCS" and "equivalent work experience." The "training" category includes "formal company training" and "formal technical or trade school."

On September 26, 2002, the Area Managers held a meeting and ranked all of the Band C employees in affected work groups. Their ranking decisions were unanimous. Because there is no contemporaneous document detailing the reasons for each employee's particular ranking, Mr. Wooten--one of the Area Managers who participated in the ranking meeting--provided an affidavit in this case that explained why each employee was ranked higher or lower than Ms. Sanders.

For example, the first-ranked employee in Band C in Ms. Sanders's affected work group "had been in his

engineering position longer than Ms. Sanders, and his skill level was considered to be greater than Ms. Sanders." The second-ranked employee "had construction experience and was considered to be more versatile than Ms. Sanders." The sixth-ranked employee "had been promoted . . . from his cable splicing technician job. Even though he had not been an engineer as long as Ms. Sanders, he was able to learn his job very quickly due to his outside technical background. His skills were considered to be greater than Ms. Sanders." These explanations are consistent with SWBT's RIF policy, as outlined in both the MSG and the guide provided by Mr. McNeely.

Ms. Sanders appears to argue, however, that SWBT did not apply its RIF criteria consistently and uniformly across all of its employees. As evidence, she points out that she had been in an engineering position for more time than at least one person ranked ahead of her in Band C. She thus concludes that SWBT did not consider her tenure when ranking her against that employee.

There is, however, no evidence to suggest that SWBT failed to consider her tenure. According to Mr. Wooten's affidavit, she was ranked lower than the other employee because he "had an outside construction background and prior supervisory experience. . . . His outside construction background enabled him to independently complete jobs. Ms. Sanders was not as autonomous." Although Ms. Sanders may have been in an engineering position longer than the other employee, an employee's tenure as an engineer was only one of many possible ranking criteria in the MSG categories of "performance, skills, experience, and training."

We therefore do not agree with Ms. Sanders's position. The descriptors used in Mr. Wooten's affidavit are entirely consistent with the criteria set forth in Mr. McNeely's ranking instructions. This fact distinguishes the present case from *Beaird* because SWBT's ranking method did not deviate from its stated policy. *See Beaird*, 145 F.3d at 1173-74.

Moreover, Mr. Wooten's affidavit is not evidence that SWBT inconsistently applied the RIF criteria. His affidavit's purpose is merely to illustrate why a specific employee was ranked higher than Ms. Sanders, not to provide a comprehensive list of all the ranking criteria assessed by SWBT's Area Managers. That the affidavit is selective in its detail is no indication that the RIF was similarly selective. Again, this fact distinguishes this case from *Beaird*. *See id.* (explaining that selective use of RIF criteria *in identifying employees to be laid off* is evidence of pretext).

Voluntary Demotion of an Area Manager

Ms. Sanders also takes issue with the voluntary demotion of Rick Griffith from an Area Manager to a Manager-Engineer. We do not consider this to be evidence of pretext.

The Area Managers, including Mr. Griffith, knew that SWBT would be retaining only thirteen of the seventeen Band C Managers-Engineering in the Oklahoma City/Stillwater area. At the Area Managers' ranking meeting in September, the managers unanimously ranked Ms. Sanders thirteenth. Thus, at that time, she was considered "safe" from the RIF.

After the ranking meeting, SWBT enacted a policy whereby an Area Manager who is subject to a RIF may take a voluntary demotion to an engineer position rather than risk being laid off. Also at this time, the Area Managers who had ranked the engineers knew that one of them (the Area Managers) would be laid off pursuant to the fall 2002 RIF. As the most junior Area Manager, Mr. Griffith considered himself to be the most likely candidate to lose his job, so he volunteered to be demoted to a Manager-Engineering. This demotion necessitated the surplus of an additional engineer from the group. Ms. Sanders, as the next-lowest ranked engineer, was selected to be surplussed.

Although Ms. Sanders contends that Mr. Griffith "basically was able to pick who was going to be surplussed as a result of his stepping down," we find nothing about his decision or the enactment of the policy itself that is indicative of pretext. Because the voluntary-demotion policy was not enacted until after the ranking meeting, at the time Mr. Griffith ranked Ms. Sanders he thought she would be retained. Further, there is no evidence that suggests Mr. Griffith took a demotion because he wanted Ms. Sanders, as a woman, to be surplussed. Therefore, his transfer into Ms. Sanders's engineering group does not call into question the nondiscriminatory purpose of the RIF as asserted by SWBT.

Statistical Evidence

There were 102 first-level managers in the Oklahoma C&E group prior to the fall 2002 RIF. Nineteen were women and eighty-three were men. Ten of the nineteen women, or 52%, were surplussed. Eleven of the eighty-

three men, or 13%, were surplussed. Ms. Sanders and Ms. Coffey suggest that sex discrimination can be inferred because a greater percentage of women were selected for the RIF.

"Statistics taken in isolation are generally not probative of age discrimination." *Doan v. Seagate Tech., Inc.*, 82 F.3d 974, 979 (10th Cir. 1996) (quotations omitted). Specifically, "[s]tatistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of pretext." *See id.* Thus, "[s]tatistical evidence that does not adjust for the various performance evaluations and departmental rankings of the employees included in the statistical pool" is insufficient to establish pretext. *See Pippin v. Burlington Res. Oil & Gas Co.*, 440 F.3d 1186, 1197-98 (10th Cir. 2006).

The district court correctly noted that the plaintiffs' statistical evidence does not take into consideration nondiscriminatory explanations for the disparity--for example, differences in various individuals' job performance, experience, and training. Because the statistics fail to account for these variables, they do not constitute evidence of pretext. *See id.* (in RIF case, statistical evidence that fourteen of nineteen terminated employees were over forty years old is not evidence of pretext because the statistics do not account for individuals' skills or prior performance); *see also Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10th Cir. 1994) ("Plaintiff's statistical evidence compares only the ages of employees retained with the ages of those laid off. . . . Plaintiff's statistical evidence fails to eliminate nondiscriminatory explanations for disparate treatment--*i.e.*, that those laid off had lower

performance evaluations and rankings than those retained-and therefore does not permit an inference of pretext."); Furr v. Seagate Tech., Inc., 82 F.3d 980, 987 (10th Cir. 1996) (not permitting an inference of pretext where "[p]laintiffs' statistics grouped all employees together regardless of specialty or skill and failed to take into account nondiscriminatory reasons for the numerical disparities.").

III. DISMISSAL OF SBC

A plaintiff must serve a defendant with a summons and a copy of the complaint within 120 days after the filing of the complaint. Fed. R. Civ. P. 4(m). If service is not made within 120 days, the court:

> on motion or on its own after notice to the plaintiff[,] must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

Id. We review for abuse of discretion the district court's dismissal of a defendant for improper service. *See Scott v. Hern*, 216 F.3d 897, 912 (10th Cir. 2000).

Here, the district court sua sponte dismissed SBC for insufficient service of process and was therefore required to give prior notice to the plaintiff under Rule 4(m).[7] Among other things, the notice requirement affords the plaintiff the opportunity to show good cause for improper service. *See Espinoza v. United States*, 52 F.3d 838, 841 (10th Cir. 1995) ("The preliminary inquiry

to be made under Rule 4(m) is whether the plaintiff has shown good cause for the failure to timely effect service."). "If good cause is shown, the plaintiff is entitled to a mandatory extension of time. If the plaintiff fails to show good cause, the district court must still consider whether a permissive extension of time may be warranted." *Id.* Indeed, a court must expressly consider a plaintiff's argument regarding good cause, because "[w]ithout anything in the record to indicate how the district court made its determination with respect to the good cause exception . . . appellate review is impossible." *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455, 1459 (10th Cir. 1995).

In this case the district court did not notify the plaintiffs of its intention to dismiss SBC for improper service. In its order of dismissal, the district court also concluded, without explanation, that the plaintiffs had not served SBC and had not shown good cause regarding their failure to do so. Because the district court did not give the plaintiffs an opportunity to argue that they did, in fact, serve SBC or that they had good cause not to, the district court abused its discretion in sua sponte dismissing SBC.

IV. CONCLUSION

We REVERSE the entry of summary judgment in favor of SWBT on Ms. Sanders's age discrimination claim. Because none of the plaintiffs have demonstrated that SWBT's RIF was a pretext for sex discrimination, we AFFIRM the district court's entry of summary judgment in favor of SWBT on those claims. We similarly AFFIRM the summary judgment order as to Ms. Coffey's and Ms. Brooks's age discrimination

claims. Finally, we REVERSE the district court's sua sponte dismissal of SBC as a defendant and REMAND for further proceedings not inconsistent with this opinion.

Footnotes

[1]At the time of the ranking meeting, the seventeen managers in Band C ranged in age from forty-two to fifty-five. Ms. Sanders was forty-eight. She was younger than each person ranked below her, and she was younger than half of the people ranked above her. Indeed, the top-four-ranked individuals were all older than Ms. Sanders. Of the seventeen total managers, five (including Ms. Sanders) were women. Two women were ranked above Ms. Sanders; two were ranked below her. Thus, all but two of the men were ranked above Ms. Sanders.

[2]At the time of the ranking meeting, the six managers in Band C ranged in age from forty-five to fifty-five. Ms. Coffey was the youngest, and she was the only woman.

[3]The plaintiffs' complaint asserts several additional claims, all of which were either dismissed under Fed. R. Civ. P. 12(b)(6) or decided in favor of SWBT in the district court's summary judgment order. The plaintiffs have explicitly abandoned most of those claims on appeal. The two claims which the plaintiffs have not explicitly abandoned--a common-law tort claim, *see Burk v. K-Mart Corp.*, 1989 OK 22, 770 P.2d 24 (Okla. 1989), and Ms. Coffey's sex-discrimination claim based on equal pay--are waived due to inadequate briefing on

appeal. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005).

[4]The district court concluded that "[g]iven the different versions of this conversation between Wooten and Sanders, this evidence is at most circumstantial." The court then analyzed Ms. Sanders's age-discrimination claim under the *McDonnell Douglas* framework and held that Ms. Sanders had not met her burden to show that SWBT's reason for surplussing her was pretextual. Because Mr. Wooten's alleged statement is direct--not circumstantial--evidence of age discrimination, the district court erred in analyzing her claim under *McDonnell Douglas.*

[5]All three plaintiffs are women. All received performance evaluations rating them as "average" and praising specific efforts each had made. All three were surplussed, causing them to leave an affected work group in which SWBT retained at least one male manager. The three plaintiffs thus have established a prima facie case of discrimination based on sex. *See Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 531 (10th Cir. 1998). As to Ms. Coffey's and Ms. Brooks's age discrimination claims, because both plaintiffs are also over the age of forty and left affected work groups in which a significantly younger manager was retained, they have similarly established a prima facie case of age discrimination. *Id.*

[6]Ms. Coffey contends that her job title (and resulting function) was different from other job titles included in her affected work group. Although not acknowledged by Ms. Coffey, we have stated that pretext may be shown by evidence that the employer designed a RIF

to impact certain protected employees--which may be the case when an employer limits the RIF to certain groups of employees without articulating a rational justification for those categorizations. *See Beaird*, 145 F.3d at 1170-71. If that were the case here, the fact that Ms. Coffey was the youngest employee in Band C would not be sufficient to entitle SWBT to summary judgment on her claim of age discrimination. But Ms. Coffey has not put forth any evidence that SWBT did not consider her job to be equivalent to others it included in the affected work group of Managers-Construction in the Oklahoma City/Stillwater area. It is undisputed that under the MSG, corporate managers determine the parameters of an affected work group based on job title, similar job functions, geography, lines of organization, or other definable attribute, based on the needs of the business. SWBT determined that Construction-Engineers and Construction-Contract Coordinators would be pooled together to form an affected work group. Ms. Coffey does not present any evidence (indeed, she did not depose anyone concerning the decision to make this grouping) that calls this business judgment into question. Nor does she suggest that the effect or purpose of this particular grouping was to subject older employees to the RIF. Rather, Ms. Coffey herself contends that SWBT should not have made this grouping simply because, according to her, her job as a Contract Coordinator is different than that of an Engineer. SWBT, however, is not precluded from grouping different jobs together, so long as it deems them sufficiently similar in some type of way that would make it appropriate, based on the needs of the business, to do so. In short, Ms. Coffey's personal belief does not call into question the propriety of SWBT's decision. *See Beaird v. Seagate Tech., Inc.*, 145 F.3d

1159, 1171 (10th Cir. 1998) ("Appellants may believe that [a corporation's] job coding should be by job qualification, not function performed, but it is not our place to disturb that kind of business judgment.").

[7]The court's order indicates that SBC had moved for dismissal. In fact, SBC had not done so. Rather, SWBT had stated in footnotes to several of its filings that "SBC Communications, Inc. has not yet been served. . . . SBC Communications, Inc. [was not] the Plaintiffs' employer. Plaintiffs' employer was SWBT."

CONCUR BY: McKAY (In Part)
DISSENT BY: McKAY (In Part)
DISSENT

McKAY, Circuit Judge, *concurring in part and dissenting in part.*

In this summary judgment case, I view the applicable law and the record differently from the majority and must, therefore, respectfully dissent. I agree with the majority that this is a circumstantial case, and I agree with the majority's disposition of all claims except the gender discrimination claims of Ms. Sanders and Ms. Coffey, and I conclude Ms. Sanders has established sufficient circumstantial evidence of age discrimination in addition to her direct evidence to survive summary judgment.

We are required to consider the totality of the circumstantial evidence when considering claims of pretext. *Beaird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1174 (10th Cir. 1998). If the proffered evidence, when viewed in the aggregate, is "sufficient to raise a

genuine doubt about a [d]efendant's motivation," we may conclude a plaintiff "has met the requirements necessary to a showing of pretext." *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1220 (10th Cir. 2002) (internal quotation marks omitted). "A showing that the employer's justifications for its behavior are pretextual permits a finding of intentional discrimination, but does not compel it." *Exum v. U.S. Olympic Comm.*, 389 F.3d 1130, 1135 (10th Cir. 2004).

Generally, "[a] plaintiff demonstrates pretext by producing evidence of such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1308 (10th Cir. 2005) (internal quotation marks omitted); *Garrett*, 305 F.3d at 1217. "[E]vidence of pretext may include, but is not limited to . . . prior treatment of plaintiff; . . . disturbing procedural irregularities (e.g., falsifying or manipulating . . . criteria); and the use of subjective criteria." *Garrett*, 305 F.3d at 1217 (final alteration in original) (internal quotation marks omitted).

Specifically, in *Beaird v. Seagate Technology, Inc.*, we delineated three principal ways a plaintiff can demonstrate pretext in a RIF case. 145 F.3d at 1168. In my view, two of them apply in this instance. "First, [a plaintiff] can argue that her own termination does not accord with the RIF criteria supposedly employed," [1] even when an employer gives a business judgment reason for changing its RIF criteria midstream. *Id.*

Although an employer "may choose to conduct its RIF according to its preferred criteria" rather than criteria previously documented by the employer, the employer's application of or deviation from the documented RIF criteria is not immune to judicial review and may be "so idiosyncratic or questionable that a factfinder could reasonably find that it is a pretext for illegal discrimination." *Id.* at 1169. Selective application of documented or undocumented RIF criteria may indicate pretext. *See id.* at 1173-74.

Here, as in *Beaird*, Defendant claims to have followed its written RIF criteria. Specifically, Defendant's four main RIF criteria are listed in the MSG as "performance," "skills," "experience," and "training." (R. at 370, Management Staffing Guidelines at 9.) The MSG expressly allows Defendant to add RIF criteria, and Mr. McNeely did so in a ranking considerations instruction sheet he sent to area managers. The ranking considerations sheet listed specific subcategories of the four general RIF criteria listed in the MSG for area managers to consider when ranking Band C managers. After litigation ensued, Defendant provided affidavits from several managers listing RIF subcategories previously undocumented in the MSG or on the ranking considerations sheet as their reasons for ranking certain employees above others within Band C. Although these reasons were certainly related to the four main RIF criteria, in my view, they were not consistent with the written subcategories found in Mr. McNeely's ranking instructions. I refer to these criteria as the "undocumented RIF criteria" because they were not specifically documented in any of the contemporaneous documents relied on by Defendant when ranking employees.

The second method a plaintiff can employ to demonstrate pretext in a RIF case is to present evidence that her "evaluation under [a] defendant's RIF criteria was deliberately falsified or manipulated" to affect her employment status negatively. *Id.* at 1168. "One method of demonstrating manipulation or falsification of evaluation is to produce evidence that a supervisor responsible for assessing her performance displayed ageist [or gender] animus." *Id.*

In addition to these principal methods for demonstrating pretext, our cases explain three other relevant indications of pretext. First, "[w]hen an employer's RIF criteria include job categorization, an employer must explain the basis for that categorization or risk a finding of pretext." *Id.* at 1170. Second, the extent of apparent procedural irregularities with respect to the employee's selection for the RIF may indicate pretext. *Whittington v. Nordam Group Inc.*, 429 F.3d 986, 994 (10th Cir. 2005); *see also Plotke v. White*, 405 F.3d 1092, 1104 (10th Cir. 2005); *Garrett*, 305 F.3d at 1220. Third, inconsistencies in an employer's explanation of the reasons for its negative employment action may also indicate pretext. *Id.*

Thus, in analyzing Plaintiffs' claims, the court should focus its pretext analysis on the aforementioned five categories: (1) selective application of RIF criteria, (2) manipulation of employee evaluations under RIF criteria, (3) inadequate employer explanation for job categorizations, (4) RIF procedural irregularities, and (5) inconsistent employer reasons for surplussing.

Circumstantial Evidence as to Ms. Sanders

Ms. Sanders produced circumstantial evidence related to age and gender discrimination in four of the five pretext categories the court should consider. I conclude Ms. Sanders has produced evidence supporting a finding of pretext in three of those four categories.

Selective Application of RIF Criteria

To survive summary judgment in this category, Ms. Sanders needed to show Defendant's application of or deviation from its RIF criteria was so "idiosyncratic or questionable that a factfinder could reasonably find that it is pretext for illegal discrimination." *Beaird*, 145 F.3d at 1169. Deviation from documented RIF criteria alone does not support an inference of pretext. However, selective or non-uniform application of either documented or undocumented criteria may be sufficient to support such an inference.

When an employee provides sufficient circumstantial evidence to support a finding of pretext due to an employer's selective application of its chosen RIF criteria, the employer may then attempt to meet the *Reeves* burden of providing abundant and uncontroverted evidence that no discrimination occurred to rebut the employee's pretext claim and to preserve the employer's claim of being entitled to summary judgment. I would hold that an employer has provided abundant and uncontroverted evidence of its non-discriminatory RIF criteria application if the employer can document an observable pattern of RIF criteria application that shows the employer applied the same criteria to a large majority of its at-risk employees. When, as I see in this case, an employer

selectively applies any RIF criteria favoring a minority of employees, who then finish with a higher rank than those surplussed, I would hold an employer did not meet its burden of presenting abundant and uncontroverted evidence of no discrimination to preserve its claim for summary judgment.

In this case, Defendant's MSG states repeatedly that managers should use criteria such as performance, skills, experience and training as benchmark RIF criteria. [2] Early in litigation, Defendant explained managers ranked Band C employees "from high to low based on their performance, skills, experience, and training." (R. at 181, Def. SWBT's Mot. for Summ. J. and Br. in Supp. at 10.) Mr. McNeely claims he followed the MSG process for the RIF and instructed area managers to rank Band C employees using performance, skills, experience, and training criteria. Two of Defendant's area managers, Mr. Alfred Saenz and Mr. Mike Harris, also claimed they used the four primary documented RIF ranking criteria.

Mr. McNeely also sent managers a ranking considerations sheet with a list of subset categories for the four main criteria to use when ranking their Band C managers. [3] The ranking considerations sheet explained that, because Defendant had already used the performance criterion to calculate the band ratings, managers should use only the remaining three RIF criteria and their subcategories for ranking purposes. The ranking considerations sheet expressly instructed area managers to "[u]se the Skills, Experience and Training sections below in order to help in determining the ranking of the C band." (R. at 233, Ranking Considerations at 1.)

Defendant claims it used its RIF criteria to rank Ms. Sanders and the other employees in her group. However, Defendant's specific explanation, proffered after litigation ensued, for why certain employees were ranked above Ms. Sanders included several factors not listed in either the MSG or on the ranking considerations sheet provided by Mr. McNeely. Specifically, Defendant proffered twelve categories of undocumented criteria and one category of documented criteria to explain why twelve of Ms. Sanders' peers, four of whom were younger and male, six of whom were older and male, and two of whom were younger and female, were ranked ahead of her. Although this fact alone does not support an inference of pretext, the record strongly supports an inference that Defendant did not apply these criteria uniformly to each employee when ranking twelve employees ahead of Ms. Sanders. In my view, using criteria not listed on the ranking considerations sheet and not considering all three content areas as instructed constituted a deviation from the RIF criteria "supposedly employed." *Beaird*, 145 F.3d at 1168. I conclude Defendant then applied its chosen RIF criteria selectively.

The highest level of selectivity Defendant employed was when it applied six of the twelve undocumented criteria only once to six different employees ranked above Ms. Sanders and did not apply any of those six undocumented categories to any of the other eleven employees ranked ahead of Ms. Sanders.[4] Defendant applied three of the undocumented criteria to only two other employees.[5] Defendant applied one undocumented criterion to three other employees who outranked Ms. Sanders.[6] At best, the largest number of

employees out of the twelve ranked ahead of Ms. Sanders that Defendant applied undocumented criteria to was five employees.[7]

Moreover, I am of the view that this inference of a selective, non-uniform approach is uncontroverted by the record. Indeed, there is little to no evidence from the area managers' meeting indicating they discussed the undocumented criteria at all. The sketchy notes from that meeting support an inference that they did not uniformly apply their chosen criteria to a large majority of at-risk employees.

Specific examples of employees who outranked Ms. Sanders according to these undocumented criteria are as follows. First, Defendant ranked Mr. Michael Heatley higher than Ms. Sanders using the undocumented criteria of having "greater" skills. Even though Mr. Heatley did not have an extensive engineering background, he was considered to have greater skills because he learned quickly. (R. at 304, Harris Aff. 4 Par 11.) Yet the record indicates Defendant used Ms. Sanders to train new engineers rather than Mr. Heatley, whom Defendant indicated had greater skills.

Second, Defendant listed outside construction background as the undocumented criteria for ranking Mr. Alton Miller ahead of Ms. Sanders. Ms. Sanders trained Mr. Miller in 2002 when he was on a PIP for misconduct in his prior supervisory position. Mr. Miller had less time in his engineering position than Ms. Sanders. He had three months' experience in 1983 and eight months' in 2002 contrasted with Ms. Sanders' ten years as an engineer. Length of time as an engineer

was one of the undocumented criteria area managers used to place Ms. Sanders below some of her other peers, yet they did not uniformly apply that same criteria when comparing her to Mr. Miller. In addition, Ms. Sanders' productivity was nearly three times higher than Mr. Miller's. Productivity was another undocumented RIF criterion Defendant used in its considerations when ranking employees because it appeared in handwritten notes from the ranking meeting next to Ms. Sanders' name.

Third, like Ms. Sanders, Mr. Woody Harjo had no outside plant technical experience, but Defendant retained him. Defendant ranked Mr. Harjo higher than Ms. Sanders and Ms. Nancy Bounds, who was also surplussed. According to the undocumented criteria, Ms. Bounds, like Ms. Sanders, was ranked lower because of having no outside plant experience. Even though neither Ms. Sanders, Ms. Bounds, nor Mr. Harjo had outside plant technical experience, Mr. Harjo was retained for his drafting and CAD background which Defendant claimed made him more versatile than either Ms. Sanders or Ms. Bounds. (R. at 305-06, Harris Aff. 5-6 Par 11.) Ms. Bounds had a drafting background, and as noted above, Ms. Sanders supervised drafting clerks. The record does not indicate if Ms. Sanders' or Ms. Bounds' drafting experience included CAD work.

Thus, the non-uniform application of undocumented RIF criteria when cross-comparing employees during ranking, little to no evidence from the area managers' ranking meetings indicating that they discussed the undocumented criteria at all and, finally, the existence of only sketchy notes regarding the criteria they did discuss when ranking employees all would combine to

provide a reasonable juror with sufficient circumstantial evidence to support a finding of pretext in this area. In my view, Ms. Sanders' circumstantial evidence of this selective application strongly supports an inference of pretext.

Finally, because Defendant applied each of its chosen RIF criterion to less than a large majority of ranked employees, I conclude it did not provide abundant and uncontroverted independent evidence of non-discrimination and, therefore, cannot preserve its claim for summary judgment in this area.

RIF Procedural Irregularities

I am of the view that Ms. Sanders provided circumstantial evidence of RIF procedural irregularities in two areas. First, Ms. Sanders points to Mr. Griffith's participation in the ranking meeting in which Ms. Sanders was ranked thirteenth in the Band C pool of employees. The area managers knew before the ranking meeting Defendant would retain a specified number of first-level managers in Bands A-C. In fact, Defendant planned to retain all Band A and B managers but only thirteen Band C managers. The evidence supports an inference that Mr. Griffith knew he was likely to be surplussed from his position as an area manger because he was the least senior area manager. After participating in the ranking meeting, Mr. Griffith requested, pursuant to a policy adopted after the ranking meeting, a voluntary demotion from an area manager to a first-level manager in Ms. Sanders' group to avoid being surplussed as an area manger during the RIF. Even though he was demoted, Mr. Griffith experienced no change in salary. I agree

with the majority that Mr. Griffith's demotion does not, by itself, provide support for a finding of pretext under irregular RIF procedures because Defendant is entitled to use its business judgment to create policies regulating transfers and to transfer employees according to those policies for legitimate business purposes. Moreover, the record provides no evidence that Mr. Griffith's demotion was not conducted pursuant to a legitimate business decision.

Nevertheless, in my view, an inference of pretext arises from Mr. Griffith's participation in the area managers' ranking meeting at a time he knew his job was vulnerable and knew he might be transferring into the group of employees he helped to rank. Mr. Griffith was a decision maker at the meeting in which Defendant ranked Ms. Sanders thirteenth, after twelve other individuals who were either male or younger than Ms. Sanders, or both. I find Mr. Griffith's involvement in the decision to rank Ms. Sanders thirteenth to be irregular when he knew she would be the next person surplussed if the total size of her manager group increased. That knowledge and Mr. Griffith's subsequent request for a transfer to Ms. Sanders' group combine to constitute a procedural irregularity that provides some support for a finding of pretext under the totality of the circumstances standard.

Second, Ms. Sanders provided circumstantial evidence of a procedural irregularity with respect to one topic of possible discussion at the area managers' ranking meeting. That topic was age. Mr. Wooten claimed he did not know the ages of the engineers who reported to him and that age was not a factor in the rankings, yet his notes from the meeting indicated six pension-

eligible employees with a star. Although pension eligibility is not necessarily connected to age, it is sufficiently related under the circumstances of this case, to allow a reasonable juror to infer the area managers discussed age when discussing pension eligibility during the meeting. While this evidence, standing alone, would be insufficient to support a finding of pretext, under the totality of the circumstances standard, a reasonable juror could examine it along with the other evidence and infer from it that the area managers discussed age at the meeting.

Inconsistent Employer Reasons for Surplussing

If an employer offers inconsistent reasons for surplussing, we consider "(1) the timing of the change in position and (2) the evidentiary basis for the new rationale." *Jaramillo*, 427 F.3d at 1311. A change in explanation occurring after significant legal proceedings have occurred supports an inference of pretext. *Id.*

Defendant gave numerous reasons at different times for surplussing Ms. Sanders. First, Mr. Wooten allegedly told Ms. Sanders directly that she was surplussed because of her age. However, in his affidavit and on his ranking notes, Mr. Wooten indicated Ms. Sanders' productivity was the problem. Defendant elsewhere stated that Ms. Sanders' lack of outside plant technical experience, work experience, and technical skills were the factors that led to her being surplussed. For instance, Mr. Harris stated that "Ms. Sanders' ranking was primarily attributable to her non-technical background. A technical background is extremely valuable to an engineer's working knowledge of outside

plant facilities. Ms. Sanders was at a disadvantage since she did not have outside plant experience." (R. at 304, Harris Aff. 4 Par 11.)

Defendant provided its age and productivity reasons during the RIF process both in Mr. Wooten's conversation with Ms. Sanders and in the notes from the ranking meeting. However, Defendant's later, inconsistent explanation was provided after Ms. Sanders filed suit. I find this change in explanation supports a finding of pretext because Defendant's rationale changed after significant legal proceedings had occurred.

Conclusion as to Ms. Sanders

Viewing the evidence in the light most favorable to Ms. Sanders and under the totality of the circumstances standard, I conclude Ms. Sanders has produced a strong case of circumstantial evidence to support a finding of pretext. I am of the view that Defendant has not produced abundant and uncontroverted evidence showing discrimination did not occur and cannot preserve its claim of being entitled to summary judgment as a matter of law. Therefore, I would reverse and remand on both Ms. Sanders' age and gender discrimination claims.

Circumstantial Evidence as to Ms. Coffey

Ms. Coffey produced circumstantial evidence of discrimination in four of the five categories the court should analyze. However, because Ms. Coffey was not ranked against any younger employees, I agree with the majority that her age discrimination claim cannot

survive summary judgment. I therefore analyze the circumstantial evidence only with regard to her gender discrimination claim.

Selective Application of RIF Criteria

In Ms. Coffey's case, as in Ms. Sanders', I find Defendant's explanation for its rankings is based on specific criteria undocumented in the MSG or on the ranking considerations sheet. Like Ms. Sanders, Ms. Coffey claims Defendant selectively applied its undocumented RIF criteria to preserve jobs for male employees.

The five undocumented criteria Defendant proffered for ranking five men ahead of Ms. Coffey were having engineering experience, managing the job well, being more versatile, getting along better with a boss, and having outside technical experience. Defendant also considered supervisory experience, one of the documented criteria found on the ranking considerations sheet. Like Ms. Sanders, Ms. Coffey provides sufficient circumstantial evidence to support a finding of pretext in Defendant's selective application of its chosen RIF criteria.

Specifically, Defendant applied three of the five undocumented criteria only once to three different employees ranked ahead of Ms. Coffey and did not apply those same criteria to the other two employees ranked ahead of Ms. Coffey.[8] Defendant applied the other two criteria to only two employees ranked ahead of Ms. Coffey.[9] Defendant applied none of these undocumented criteria to a large majority of at-risk employees.

Specific examples of the selective applications are as follows. Defendant ranked Mr. Roger Cox ahead of Ms. Coffey using one undocumented criterion. It stated Mr. Cox had a diverse working background and was thus more versatile than Ms. Coffey. Defendant cites to this criterion only one other time, when describing Mr. Steven Parrot. There is no mention of this undocumented criterion for any of the other three candidates ranked ahead of Ms. Coffey. Thus, the court has no way of knowing whether any of the other candidates ranked ahead of Ms. Coffey also had a more diverse work background. In my view, therefore, it was not uniformly applied.

Defendant also ranked Mr. Rolland King higher than Ms. Coffey because he managed his job well and because his boss was not having problems with him like Mr. Harris claimed he was having with Ms. Coffey. These two undocumented RIF criteria do not appear in the record in regard to any other person ranked higher than Ms. Coffey. Thus, they were not uniformly applied. In addition, Mr. Harris' statement that he was having problems with Ms. Coffey is possibly in conflict with Mr. Harris' evaluation of Ms. Coffey just nine months before when he wrote, "Ms. Coffey continues to learn and grow in her job. She works well with others and is a team player." (R. at 311, Exhibit 7-B at 2.)

Finally, Defendant ranked Mr. John Starwalt higher than Ms. Coffey because he had more engineering experience and an outside technical background. The record indicates Defendant applied the engineering experience criterion only to Mr. Starwalt, and it applied the outside technical background criterion only to one

other person ranked higher than Ms. Coffey. Again, I conclude Defendant selectively applied undocumented RIF criteria.

Accordingly, I am of the view that Ms. Coffey has provided sufficient circumstantial evidence to support a finding of pretext in Defendant's selective application of undocumented RIF criteria. Because I see no observable pattern of RIF criteria application to a large majority of Defendant's at-risk employees, I conclude Defendant has not produced abundant and uncontroverted evidence of non-discrimination and thus cannot preserve its claim for summary judgment in this area.

Manipulation of Employee Evaluation

A reasonable juror can draw an inference that an employer has manipulated its evaluation of an employee under its RIF criteria if the record indicates evidence of gender animus on the part of a supervisor with power to assess an employee's job performance. *See Beaird*, 145 F.3d at 1168. Inherent gender animus can warp a supervisor's evaluation of an employee. In this case, Mr. Harris was Ms. Coffey's immediate supervisor, and Ms. Kaylan Collins stated that she personally overheard Mr. Harris make "sexist remarks about female employees/managers." (R. at 1003, Collins Aff. 2 Par.10.) Ms. Collins' statement alone is sufficient to support a finding of pretext in this area.

Moreover, Ms. Coffey presented other evidence that, viewed in the light most favorable to her and under the totality of the circumstances, provides some support for an inference of pretext in this category. For instance,

Ms. Coffey stated in her affidavit that Mr. Harris scrutinized female employees more closely than male employees. She claimed a male employee noticed the same behavior in Mr. Harris and mentioned it to her. Ms. Coffey also claimed that Mr. Harris rarely encouraged her in her work, and she believed he did not want to deal with women. Finally, Ms. Coffey stated in her deposition that another female employee had been told by Mr. Harris that she was a nice looking woman, and that if she dressed up and went for an "after hours' interview" with the hiring manager, he thought she could probably get the job she was seeking. (R. at 759, Coffey Dep. 109:11-15.)

Inadequate Employer Explanation for Job Categorization

Defendant grouped employees in Ms. Coffey's job category by job title, Manager--Construction. That job title included two subsets: construction managers, who supervised Defendant's internal cable technician employees, and contract coordinators, who oversaw outside independent contractors in fulfilling Defendant's cable work orders. Ms. Coffey was a contract coordinator, as were three of the five employees against whom she was ranked. The record indicates that a fourth employee was a construction manager, but there is a dispute regarding whether the fifth employee was a construction manager or a contract coordinator.

The Defendant's MSG required it to group employees according to their "affected work group," which the MSG defined as a portion of the organization at the same level, job title, similar job function, geography,

and line of organization. (R. at 471, P's. Combined Resp. to D's. Mot. for Summ. J. at 15; R. at 363, MSG at 2 (Note).) Defendant argues it permissibly grouped construction managers and contract coordinators under the same job title because they had the same job function. Ms. Coffey asserts her day-to-day functions as a contract coordinator differed significantly from that of a construction manager. For example, construction managers worked with Defendant's internal crews of cable technicians and provided supervision for them. Whereas Ms. Coffey, as a contract coordinator, had no supervisory authority and worked with several independent contractors at various job sites on any given day to ensure their compliance with Defendant's contracted work orders.

This contrast is important because Defendant's explanation for ranking two employees above Ms. Coffey--the two employees who were or who were alleged to be construction managers--included the criterion of prior supervisory experience, which Ms. Coffey allegedly could not obtain as a contract coordinator. Based on Defendant's use of this criterion to rank construction managers over Ms. Coffey, in my view, Defendant's grouping of the two job subsets under one title could support a finding of pretext.

RIF Procedural Irregularities

Ms. Coffey alleges Defendant applied a permissible RIF procedure in an irregular manner. Specifically, Defendant allowed its area managers to reevaluate all employees prior to the RIF if the managers thought a reevaluation was necessary. In so doing, they had the latitude to raise or to lower an employee's rating.[10] This

was likely to affect the employee's risk of being surplussed, given that only employees rated as "average" and therefore placed in Band C were vulnerable during this RIF. The reevaluating procedure itself was not irregular. However, Ms. Coffey argues, and I agree, that she has provided sufficient evidence to support an inference that her supervisor used this procedure in an irregular manner.

Mr. Harris reevaluated one of Ms. Coffey's younger, male peers who had been rated as "average" before the RIF, and raised him to an "above average," Band B rating, thus saving him from possible surplussing. Yet, Mr. Harris did not lower the ranking of another male employee, Mr. Dewayne Hendricks, who had demonstrably poor performance during the RIF period. The action or inaction standing alone would not suffice to show irregularity. However, a jury could find it to be irregular that Mr. Harris exercised his power to improve his evaluation of one employee, based on his subjective determination that the employee's performance merited reappraisal, yet did not exercise that same power to reevaluate another employee once he learned about that employee's mismanagement during the RIF period.[11] In my view, Ms. Coffey has provided sufficient evidence to support a finding of pretext based upon this procedural irregularity.

Conclusion as to Ms. Coffey

Viewing this evidence in the light most favorable to Ms. Coffey and under the totality of the circumstances standard, I conclude Ms. Coffey has produced sufficient circumstantial evidence in all four categories for which she produced evidence to support a reasonable juror's

finding of pretext as to gender discrimination. In addition, I find Defendant has not produced abundant and uncontroverted evidence showing discrimination did not occur and, therefore, cannot preserve its claim of being entitled to summary judgment as a matter of law.

For the reasons stated, I would hold that both Ms. Sanders and Ms. Coffey are entitled to trial on the gender claim and that Ms. Sanders has presented additional circumstantial support for her age claim.

Footnotes

Footnotes

[1]In *Beaird*, the RIF criteria supposedly employed were the procedures described in the employers handbook. *See id.* at 1162. *Beaird* was analyzing a termination not in accord with that policy. *See id.* at 1168.

[2]Organizations with a surplus condition must identify those employees who will be surplussed.

Criteria such as performance, skills, experience and training, remain key to the selection of managers for staffing the organization.

. . .

In order to evaluate employees, the following steps must be followed and documented as indicated:

1. Those managers in an affected work group potentially subject to being declared surplus should be selected *based on criteria such as performance, skills, experience and training.* Initially, employees should be assigned to one of . . . four bands:

. . .

Managers should be listed in order from high to low based upon criteria such as performance, skills, experience and training . . . .(R. at 370, Management Staffing Guidelines at 9.)

[3]The subcategories for skills consisted of management skills, technical skills, supervisory skills, effectiveness with others, ability to handle a broader scope of responsibility, and promotional possibility. Experience subsets were years of service and equivalent work experience. Training subcategories were formal company training, formal technical or trade school, and any degrees earned in school.

[4]These criteria were as follows: having a civic engineering background, learning the job quickly, having a technical splicing background, being experienced in cable repair, having experience in the control management center, having outside plant technical experience, and having drafting and CAD experience.

[5]The three undocumented criteria used only twice were as follows: having longer time in an engineering position, installation and repair experience, and construction experience.

[6]The one undocumented criterion Defendant applied to three employees was having outside plant technical experience.

[7]These two criteria were having greater skill level and being more versatile.

[8]The three undocumented criteria Defendant used only once were having engineering experience, managing the job well, and getting along better with a boss.

[9]These categories were being more versatile and having outside technical experience.

[10]Absent evidence that the area manager's subjective power to raise or lower any employee's evaluation lapses once a RIF is declared, we must assume that power continues.

[11]I must note that Defendant disputes Mr. Harris' knowledge of the employee's misbehavior during the RIF period. However, we must view the facts in the light most favorable to Plaintiffs in this appeal from summary judgment. According to Ms. Brooks' deposition testimony, Mr. Hendricks reported Mr. Harris told him during the RIF process that "if his production did not improve, that [Mr. Harris] could easily put his name on the list and take [Ms. Coffey] off." (R. at 912, Brooks Aff. 137:1-8.) This testimony creates a triable issue of fact on this point.

Case No. 03-CV-0452-CVE-FHM

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMIE K. SANDERS, an individual, DENISE J. COFFEY, an individual, and KARIE H. BROOKS, and individual, Plaintiffs

v.

SOUTHWESTERN BELL TELEPHONE, L.P., a Texas Corporation, Defendant

September 26, 2006, Decided
September 26, 2006, Filed

OPINION AND ORDER

Now before the Court is Plaintiffs' Motion to Reconsider, to Amend, Alter or Modify and/or for New Trial (Dkt. ## 180, 182, 183). Plaintiffs ask the Court to reconsider its order (Dkt. # 175), filed on September 5, 2006, granting summary judgment in favor of defendant Southwestern Bell Telephone, L.P. ("SWBT") on plaintiffs claims of gender discrimination in violation of Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e et seq., age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and fraud.

I.

Plaintiffs Karie Brooks ("Brooks"), Jamie Sanders ("Sanders"), and Denise Coffey ("Coffey") were all first

level managers in SWBT's Oklahoma Construction and Engineering ("C&E") organization. At the time of the alleged discriminatory employment practices, they were all women over the age of forty. Sanders was hired by SWBT on January 18, 1980. She was surplussed from C&E in November 2002. Coffey was hired by SWBT on October 4, 1976 and laid off in November 2002 as part of a Reduction in Force (RIF). Brooks was hired on August 16, 1982; she, too, lost her job during a RIF.

Plaintiffs alleged that SWBT intentionally moved male co-workers to "safe" jobs where they were unaffected by the RIFs. They allege that, since they were female and over the age of forty, they were targeted for surplus or termination. By contrast, defendant argued that its employment decisions were based on performance reports, including both subjective and objective criteria. It argued that the plaintiffs were ranked below their co-workers and were terminated or surplussed as a result. Defendant maintained that other similarly situated males were also terminated or surplussed and that female employees with better employment records than plaintiffs kept their jobs.

II.

"'The Federal Rules of Civil Procedure do not recognize a 'motion to reconsider.' Instead the rules allow a litigant subject to an adverse judgment to file either a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e) or a motion seeking relief from the judgment pursuant to Fed. R. Civ. P. 60(b)." *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991). Plaintiff's motion was not filed within 10 days of

the Court's judgment,[1] so the Court will treat it as a motion for relief from the judgment under Fed. R. Civ. P. 60(b), rather than a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). Fed. R. Civ. P. 60(b) provides, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b) "'is an extraordinary procedure' which 'seeks to strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the incessant command of the court's conscience that judge be done in light of all the facts.'" *Jennings v. Rivers*, 394 F.3d 850, 856 (10th Cir. 2005)(citations omitted)(emphasis in original).

III.

Plaintiffs argue that the Court has misunderstood the facts in the case and "fear that the highly disputed nature of the evidence before the Court was not made clear." Dkt. # 180, at 2. However, plaintiffs do not set forth any additional evidence that was not present at the summary judgment stage. There is no newly discovered evidence that could not have been discovered before ruling for a new trial under Fed. R. Civ. P. 59(b). Also, in this case, there is no "excusable neglect." "For purposes of Rule 60(b), excusable neglect is understood to encompass situations in which failure to comply with a . . . deadline is attributable to negligence." *Jennings*, 394 F.3d at 856 (citations omitted). Here, the Court carefully and fully considered the voluminous summary judgment record; plaintiffs do not argue that the Court did not consider relevant facts due to either its or defendant's neglect. Plaintiffs do not argue that the judgment should be vacated due to fraud or a change in the relevant case law upon which the Court relied.

There is no "other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b). Even after considering plaintiffs' reassertion of facts in their motion, the Court determines that there was no genuine issue of material fact in this case. In their motion, plaintiffs provide no reason why the Court should reconsider its previous decision. Thus, the Court denies plaintiffs' motion to reconsider.

IT IS THEREFORE ORDERED that plaintiffs' Motion to Reconsider, to Amend, Alter or Modify and/or for New Trial (Dkt. ## 180, 182, 183) is denied.

DATED this 26th day of September, 2006.

CLAIRE V. EAGAN, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Footnote

1 Fed. R. Civ. P. 59(e) provides: "Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment." Ten business days expired on September 19, 2006. See Fed. R. Civ. P. 6(a). The motion to reconsider was filed on September 20, 2006.

Case No. 03-CV-0452-CVE-FHM

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMIE K. SANDERS, an individual, DENISE J. COFFEY, an individual, and KARIE H. BROOKS, and individual, Plaintiffs

v.

SOUTHWESTERN BELL TELEPHONE, L.P., a Texas Corporation, Defendant

OPINION AND ORDER

Now before the Court are defendant's Motion for Summary Judgment (Dkt. # 81), defendant's Motion in Limine (Dkt. # 147), and plaintiffs' Motion in Limine (Dkt. # 151). Defendant, Southwestern Bell Telephone, L.P. ("SWBT"), [1] moves for summary judgment on plaintiffs' claims of gender discrimination in violation of Title VII of the Civil Rights Act ("Title VII"), 42 U.S.C. § 2000e et seq., age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., and fraud. Plaintiffs allege that defendant engaged in a pattern and practice of gender discrimination and age discrimination that had a disparate impact on women and SWBT employees between the ages of forty and seventy. In addition, plaintiff Karie H. Brooks ("Brooks") asserts a common law fraud claim. Defendant argues that: (1) claims prior to 2002 are time barred; (2) plaintiffs cannot establish a prima facie case of gender or age discrimination; (3) plaintiffs have no evidence of pretext; (4) plaintiffs have

no evidence of a pattern and practice of discrimination by defendant; and (5) Brooks' fraud claim lacks merit and is time barred. As the Court determines herein that summary judgment should be entered for the defendants, the motions in limine are moot.

I.

Plaintiffs Brooks ("Brokks"), Jamie Sanders ("Sanders"), and Denise Coffey ("Coffey") were first-level managers in SWBT's Oklahoma Construction and Engineering ("C&E") organization at the time their employment was terminated. All three plaintiffs are women over the age of forty. As managers for C&E, plaintiffs' job responsibilities included ensuring that schedules were kept and supervising day-to-day construction activities. Dkt. # 122, Ex. 14, Job Description. Sanders and Coffey allege discrimination with respect to their compensation. C&E terminated plaintiffs' employment during a Reduction in Force ("RIF") in Fall 2002. According to plaintiffs, SWBT perpetuated a pattern of terminating older female workers in favor of younger male staff. Plaintiffs allege that the Fall 2002 RIF, as applied to them, was a pretext for illegal discrimination.

The following is a synopsis of the experience, training, job performance, and compensation of Sanders, Coffey, and Brooks, based on the voluminous summary judgment record. Sanders was hired by SWBT as a Records Clerk on January 14, 1980. Dkt. # 81, Ex. 2, Sanders Resume. From 1982 to 1991, Sanders held a secretarial position. Id. From August 1991 to February 1992, she worked as a Manager -- Financial, and supervised data entry clerks. Id. Sanders held the job title of Manager -- Engineering Design from February

1992 until she was terminated in November 2002. Id. As a manager, Sanders was transferred to C&E in February 1997. Id. At C&E, Sanders' supervisor was Rick Wooten ("Wooten"), who reported to Dan McNeely ("McNeely"), the C&E Director. Id., Ex. 4, Wooten Affidavit. During her work at SWBT, both Wooten and McNeely praised Sanders for her work. Plaintiff's Response to Motion for Summary Judgment, Dkt. # 103, Ex. 1. However, according to Sanders, SWBT denied her a promotion in Spring 2001 in favor of a younger man.

In 2002, SWBT paid engineers in Sanders' peer group a range of salaries between $ 50,011 and $ 67,670. Dkt. # 81, at 30, Ex. 4-D. Sanders' salary was $ 57,745, which was roughly the average salary of the group. Id. Sanders received a higher salary than ten of the fifteen male engineers who reported to Wooten, seven of whom had more years of service than Sanders. Of the five male engineers who were paid more than Sanders, four had more work experience. Alvin Breitling was the only male coworker who was paid more despite having equivalent work experience. Id., Ex. 4-D. Breitling was paid $ 195 more than Sanders. SWBT attributes Breitling's higher salary to higher 2002 performance evaluations. Id.

Sanders was surplussed from C&E in November 2002. The Surplus Notification Letter, dated November 13, 2002, stated "we have determined that, effective immediately, your current job position will be eliminated or consolidated with one or more positions." Dkt. # 106, Ex 8. In addition to the letter, Sanders received information about the ADEA. According to Sanders, she pointed to the ADEA paperwork and

asked Wooten whether age was the reason she was selected for surplus and Wooten agreed. Dkt. # 103, Ex. 1-C. SWBT argues that Wooten did not state that Sanders was surplussed because of her age and, further, Sander's version of the conversation portrays a misunderstanding of the purpose of supplying terminated employees with information about their legal rights. According to Wooten's testimony, Sanders was selected for the Fall 2002 RIF based on her low productivity. At the time of her surplus from C&E, Sanders was 48 years old.

Coffey was hired by SWBT as a Directory Assistant Operator on October 4, 1976. Dkt. # 81, Ex. 6, Coffey Resume. Her supervisor was Mike Harris ("Harris"), who reported to McNeely. Id., Ex. 3, McNeely Affidavit. Coffey moved up the ranks in the corporation, from Directory Assistant Operator to Office Records Clerk to Records Clerk, until Harris promoted her to the position of Manager -- Construction (Contract Coordinator) in April 2000. Id., Ex. 5, Coffey Deposition, at 36. As a Contract Coordinator, Coffey was responsible for coordinating the hiring of contractors who placed cable. Id. at 38. In April 2000, Coffey's salary was $ 46,956, the same as three males promoted at the same time. Id., Ex. 7-H. However, when terminated in November 2002, she was paid less than her male counterparts. SWBT explains that the unequal wages in 2002 were justified because salary increases were proportionate to work performance evaluations and Coffey's lesser salary reflected Coffey's lesser performance.

Coffey worked as a Contract Coordinator in Oklahoma City until she was laid off in November 2002. During

her years at C&E, Coffey often received positive work reviews. Dkt. # 105, Ex. 15, Coffey Personnel File ("Denise has exceeded the quantity standards that are required for production and contract administration."). However, following the Spring 2002 RIF, Harris cautioned Coffey that her low work performance reviews placed her job at risk, as she ranked last in the Spring 2002 RIF. Coffey admits that Harris advised her to "make friends" following the Spring 2002 RIF. During her time at C&E, Coffey failed to acquire crew supervisory experience. According to plaintiffs, Harris hired John Starwalt, age 45, in August 2002 to perform Coffey's work functions despite SWBT's assertion that Coffey's position was being eliminated or consolidated. Defendant disputes this characterization of events and states that Starwalt was transferred from his engineering position in Oklahoma City to the position of Manager -- Construction in Oklahoma City based on necessary reorganization following the Spring 2002 RIF. Dkt. # 81, Ex. 3, McNeely Affidavit. According to defendant, Starwalt was not transferred with the intent to later displace Coffey. Starwalt was ranked along with other mangers for the Fall 2002 RIF. Coffey was laid off in November 2002. At the time of her surplus from C&E, Coffey was 45 years old.

Brooks was hired by SWBT as a Senior Records Clerk in Oklahoma City on August 16, 1982. From May 1989 to February 1992, she worked in a secretarial position in St. Louis. Dkt. # 81, Ex. 9, Brooks Resume. From 1992 to 2000, Brooks worked as a manager based in Dallas. Id. In March 2000, she accepted a downgrade to the position of Contract Coordinator, a first-level manager, to return to Oklahoma. Id., Ex. 8, Brooks Deposition, at 52 ("I took the demotion because I

wanted to move home."). She alleges that defendant fraudulently induced her into accepting the Oklahoma position by promising greater benefits than the job entailed. Specifically, Brooks was assigned to Project Pronto, a project to install fiber optics for high speed Internet services. According to Brooks, the Project Pronto manager, Jody Caviness, told her that Project Pronto was expected to last from three to five years. However, the project was cancelled in less than two years. By October 2001, Brooks had learned that Project Pronto would be cancelled. Id. at 59.

In November 2001, Brooks was denied a promotion which was given to a male coworker, Timothy Thompson. At that time, Brooks transferred to Enid, Oklahoma. In September 2002, Brooks worked on a significant project for which she contracted out part of the work due to her lack of experience. The parties dispute whether Brooks was properly given credit in the staff report for this September 2002 project, with a value of over $ 500,000. Although Brooks does not assert a claim of disparate pay, it is nevertheless relevant that her 2002 salary was $ 64,839. Dkt. # 81, at 30, Ex. 4-D. Similar to Sanders and Coffey, Brooks was surplussed in the Fall 2002 RIF. According to Brooks, SWBT did not eliminate her position after the RIF but rather hired Eddy Root, age 46, to assume Brooks' former job responsibilities. Root began working for SWBT in 1975. Brooks' and Root's positions were consolidated. The qualifications and rankings of Brooks and Root are discussed infra. At the time of her surplus from C&E, Brooks was 56 years old.

The RIF, in which Sanders, Coffey, and Brooks lost their jobs, occurred because their employer was facing

financial difficulties. According to SWBT, the company experienced significant loss in its customer base following the events of September 11, 2001, due to a slow economy, unfavorable regulations, and increased competition. Each plaintiff testified that she does not dispute the business necessity of the Fall 2002 RIF. See Dkt. # 81, Ex. 1, Sanders Deposition, at 73-74; Id., Ex. 5, Coffey Deposition, at 58; Id., Ex. 8, Brooks Deposition, at 78. SWBT announced a surplus of managers in Fall 2001, Spring 2002, and Fall 2002. In the Fall 2001 RIF, SWBT cancelled Project Pronto and all Project Pronto staff were terminated or absorbed into C&E. Id., Ex. 3, McNeely Affidavit, at 2. In Spring 2002, SWBT surplussed sixteen managers from C&E. Id. at 3. Plaintiffs survived the Fall 2001 and Spring 2002 RIFs. Id.

Following the Fall 2001 and Spring 2002 RIFs, SWBT experienced an imbalance of managers in certain locations and transferred several managers among offices. Id. According to defendant, McNeely and other Area Managers did not know that another surplus was coming when SWBT reorganized and transferred employees in July and August 2002. Plaintiffs allege that SWBT intentionally transferred younger males to "safe" locations to avoid the November 2002 RIF. Plaintiffs cite the testimony of Jeanne Frailey, Associate Director of Human Relations, Communications and Planning, to suggest that SWBT Area Managers knew of the Fall 2002 RIF in Spring 2002 when they made business decisions concerning transfers. However, Frailey testified that, while RIFs commonly occur at the end of the year, she does not know when the Fall 2002 RIF was arranged nor by whom. Dkt. # 106, Ex. 20, at 19. Further, according to

Frailey, SWBT business units consult with the corporate legal department and the Equal Employment Opportunity department to ensure that RIFs are implemented legally. Id., at 57.

For the Fall 2002 RIF, SWBT Area Managers ranked first-level managers into four groups based on a variety of objective and subjective criteria. Dkt. # 106-9, Ex. 20-5, Management Ranking Criteria. This ranking system was in compliance with corporate procedures for surplus. See Dkt. # 106-7, Ex. 20, Frailey Deposition. Managers who exceeded expectations were classified as Group A; [2] those who met expectations were classified as Group B; [3] those who failed to meet some expectations were identified as Group C; [4] and those who failed to meet expectations were classified as Group D. Fourteen (14) C&E managers were ranked as Group A. Dkt. # 81, Ex. 3-C, Management Ranking Form 2002. No female managers were ranked in Group A. Thirty-seven (37) C&E managers were in Group B, including six (6) female managers. Id., Fifty-three (53) C&E managers fell into Group C, [5] including thirteen (13) female managers. Id. No C&E managers were ranked into Group D. Id. All plaintiffs were ranked in Group C. Id. After this first round of ranking, employees in Group C were then ranked by performance, skills, experience, and training. Dkt. # 81, Ex. 3-B. Plaintiffs allege that the system for classifying managers had a discriminatory impact on women over forty.

In the Fall 2002 RIF, twenty-three (23) managers left the Oklahoma C&E organization - either voluntarily or involuntarily. [6] Of the 23, eleven (11) were men and twelve (12) were women. [7] Following the Fall 2002 RIF,

the manager demographics shifted from 19 of 104 (18%) female staff to 7 of 81 (8.64%) female staff. Thus, the concentration of male managers rose from 83% to over 90% following the Fall 2002 RIF. These statistics are not controlled for variables, such as training and experience of employees. Three of the female managers who were surplussed in Fall 2002 were not "at risk," but rather voluntarily terminated or transferred their employment. For example, the only other woman in Coffey's peer group, Leedell Wheeler, was ranked in Group B and was not "at risk" of termination, but voluntarily terminated her employment. The two female managers who voluntarily transferred out of C&E were Marsha Wiseman (Group B) and Paula Henderson (Group C). Had Wheeler, Wiseman, and Henderson stayed, the final demographics may have been 10 of 81 (12.3%) female staff. C&E retained female managers who had different skills and experience than plaintiffs. Unlike Sanders and Brooks, Kathryn Jones and Terri Hayes had outside plant backgrounds and were retained in the Fall 2002 RIF.

Of the 23 managers who left C&E in Fall 2002, only one was under the age of forty. In other words, over 95% of the managers surplussed were over forty years old. However, this statistic does not take into account the concentration of workers over forty years old in C&E prior to the surplus. Ten of the twenty-five managers retained in Sanders' peer group were older than Sanders, including two 55-year-olds who were the oldest employees in Sanders' group. Coffey was the second to the youngest manager in her peer group. Eight of the nine managers retained in Coffey's group were older than Coffey, including a 50-year-old, who was the oldest manager in Coffey's group, and two 49-

year-olds. Several engineers with extensive experience, including Joe Coleman and Richard Hawkins, were placed in Group C. Sanders testified that it was "unimaginable that Mr. Coleman was given a 20 rating (Band C) considering his years of experience. . . . Indeed, all of the experienced Engineers were placed in Band C." Dkt. # 103, Ex. 1, Sanders Affidavit, at 4. Although defendant states that its agents had no knowledge of plaintiffs' ages at the time of the RIF, Wooten marked the names of staff who were "Pension Eligible." Dkt. # 81, Ex. 4-C. While the summary judgment record does not provide the ages of all C&E managers, it does provide what year each manager started work at SWBT. Based on this data, the average years of experience at SWBT is comparable between groups, with the Group A average as over 25 years and the Group C average as approximately 23 years. While this is only one variable considered in ranking, it is nevertheless undermines plaintiffs' allegation that SWBT's ranking system was designed to replace older workers with younger.

Included in the summary judgment record is a chart, created by plaintiffs, which compares the experience and education of seventeen C&E managers. Dkt. # 104, Ex. 7-D. Brooks and Sanders are two of the seventeen. Of the remaining fifteen individuals, eleven were hired by SWBT before plaintiffs were hired. Breitling, a 45-year-old male, was hired in 1980, as was Sanders. Breitling had no bachelor's degree. Breitling's production is recorded as $ 333,800 for 2002. Id. Fisher, a 50-year-old male, was hired in 1982, as was Brooks. Id. Fisher also has no bachelor's degree and his 2002 production level is recorded as $ 281,000. Id. Both Breitling and Fisher were ranked in Group B. The two

new hires, Elliot and Brown, came on board C&E in 2000. Both have bachelor's degrees but relatively little experience. Elliot, age 51, and Brown, age 34, were ranked in Group B. Id. Plaintiffs argue that inconsistencies in ranking based on education and experience reveal defendant's discrimination.

Plaintiffs argue that SWBT's disparate treatment of Root and Brooks when their positions were consolidated is evidence of gender discrimination. It is undisputed that Brooks had been in her engineering position for only one year while Root had greater engineering experience. It is also undisputed that Brooks held a bachelor's degree while Root did not. According to Brooks, she had more experience as a manager at SWBT and had $ 651,100 to Root's $ 479,100 in production in 2002. Defendant states that the report crediting Brooks with over $ 500,000 in production was falsified and is inaccurate. McNeely argues that the report submitted by plaintiffs incorrectly credited Brooks for a September 2002 project, over $ 500,000 in value. According to McNeely, Brooks had only $ 7,900 in production in September 2002. Dkt. # 122, Ex. 15. Production is only one variable considered in the ranking system. Notes from the September 26, 2002 Area Managers' meeting show that Brooks was regarded as having "very little experience in C&E." Id., Ex. 4-C. Brooks was ranked in Group C while Root was ranked in Group B.

Defendant argues that it used a transparent and fair ranking system to determine who was subject to the RIF. According to SWBT, relocation was not an option for the Fall 2002 RIF as it was for the previous two RIF's. Therefore, it ranked employees by job title and

location. Dkt. # 81, Ex. 3, McNeely Affidavit. Ranking criteria included versatility, attitude, autonomy, supervisory experience, the size of the job and/or specific job titles worked on or held, and outside plant experience. According to SWBT, it terminated plaintiffs because they ranked lower than others in their respective peer groups. Id., Ex. 3-C, Performance Ratings. Plaintiffs admit that they never heard Wooten, Harris, or McNeely make any ageist or sexist comments. Id., Ex. 1, Sanders Deposition, at 153; Ex. 5, Coffey Deposition, at 98; Ex. 8, Brooks Deposition, at 117. Plaintiffs allegation is that SWBT's subjective ranking criteria led to discriminatory impact.

Plaintiffs completed and filed intake questionnaires on March 3, 2003. Dkt. # 109, Ex. 40. Brooks and Coffey filed charges of discrimination with the EEOC on March 28, 2003; Sanders filed her perfected charge on March 31, 2003.

II.

Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317,322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Kendall v. Watkins*, 998 F.2d 848, 850 (10th Cir. 1993). "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that

party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 317.

"When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)(citations omitted). In its review, the Court construes the record in the light most favorable to the party opposing summary judgment. *Garratt v. Walker*, 164 F.3d 1249, 1251 (10th Cir. 1998). "The mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the [trier of fact] could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

III.

Plaintiffs allege that they suffered illegal discrimination from a failure to promote and denial of transfer, gender discrimination in violation of Title VII based on the RIF, gender discrimination in violation of Title VII based on unequal pay, age discrimination in violation of the ADEA based on the RIF, and fraud. For different reasons, defendant is entitled to summary judgment on all of plaintiffs' claims.

Statute of Limitations under Title VII and the APEA

The Court will first address plaintiffs' claims of discrimination which are time barred. Under Title VII and the ADEA, the aggrieved employee must file a charge with the Equal Employment Opportunity Commission ("EEOC") within 300 days of the alleged unlawful discriminatory practice. 29 U.S.C. § 626(d)(2); 42 U.S.C. § 2000e-5(e)(1); *Duncan v. Manager. Dep't of Safety, City and County of Denver*, 397 F.3d 1300, 1310 (10th Cir. 2005). Failure to comply with this procedural prerequisite will bar a plaintiff's employment discrimination claim. *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1260-61 (10th Cir. 1976)(compliance with statutory time limitation for filing an EEOC charge is a condition precedent before an employee may sue his employer).

"[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Because each discrete act starts a new clock for filing charges alleging that act, the charge must be filed within the ... 300-day period after the act occurred." *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002). Sanders alleges that she was denied a promotion on the basis of her age and gender in Spring 2001 and Brooks alleges that she was transferred to an undesirable worksite on the basis of her age and gender in November 2001. It is undisputed that neither Sanders nor Brooks filed an EEOC charge prior to filing an intake questionnaire on March 3, 2003. Thus, plaintiffs' claims premised on discrete acts occurring prior to May 7, 2002 (300 days prior to March 3, 2003) are time-barred.

Plaintiffs argue that the 2001 failure to promote and the 2001 transfer are parts of SWBT's continuing violation of anti-discrimination laws. However, these incidents are discrete events. *Id.* at 114 ("Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice."); *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1184 (10th Cir. 2003) (holding that "a continuing violation theory of discrimination is not permitted for claims against discrete acts of discrimination, such as termination, failure to promote, denial of transfer, or a refusal to hire."). Summary judgment as to plaintiffs' discrimination claims based on failure to promote and transfer is required based on plaintiffs' failure to satisfy EEOC filing requirements. [8]

Gender Discrimination under Title VII -- RIF

To survive summary judgment on their remaining gender discrimination claims under Title VII, plaintiffs must satisfy the McDonnell Douglas burden shifting analysis. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). First, plaintiffs must establish a prima facie case of employment discrimination. *Id.* at 802. Next, defendant must articulate a legitimate nondiscriminatory reason for its employment decision. *Id.* at 803. Finally, the burden shifts back to plaintiffs to show that SWBT's stated nondiscriminatory reason is mere pretext.

In the context of a RIF, a prima facie case of gender discrimination requires that plaintiffs show that: they

are members of the protected class; at the time of the RIF, they were doing satisfactory work; they were terminated despite the adequacy of their work; and there is evidence that the employer intended to discriminate against plaintiffs. *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1166 (10th Cir. 1998).

Plaintiffs have established a prima facie case of gender discrimination. As an initial matter, Sanders, Coffey, and Brooks are members of a protected class under Title VII. Plaintiffs have presented evidence that they were terminated despite the adequacy of their work, including SWBT's ranking of plaintiffs in Group C, rather than Group D, and the letters of praise for plaintiffs' work. Within the McDonnell Douglas framework, the fourth element is distinct from the pretext step. *Beaird*, 145 F.3d at 1166. "A prima facie case of discrimination is one sufficient to raise a presumption of intentional discrimination." Id. (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)). "[A] plaintiff who is fired pursuant to a RIF and who held a similar position to a [male] retained employee can satisfy the fourth element." *Beaird*, 145 F.3d at 1167 n.4 (this analysis applies to gender- and age-based claims). It is undisputed that SWBT retained male managers in the Fall 2002 RIF. Accordingly, plaintiffs have established a prima facie case of gender discrimination in the RIF, and the burden shifts to defendant.

Under the burden-shifting scheme, once plaintiffs establish a prima facie case of discrimination, a presumption of discrimination arises and the burden of production shifts to the employer to articulate a legitimate nondiscriminatory reason for the challenged

employment decision. See *St. Mary's Honor Ctr.*, 509 U.S. at 506-08. According to SWBT, plaintiffs were surplussed due to business hardship resulting from a slow economy, unfavorable regulations, and increased competition. Because defendant has articulated a legitimate nondiscriminatory reason for the RIF, the burden shifts back to plaintiffs to show that SWBT's proffered reason is mere pretext for illegal discrimination.

In a RIF case, a plaintiff can establish pretext in several ways:

> First, she can argue that her own termination does not accord with the RIF criteria supposedly employed. . . . But minor inconsistencies in the application of RIF criteria may be too insubstantial to allow a reasonable jury to infer that the RIF was pretextual. Second, a plaintiff can adduce evidence that her evaluation under the defendant's RIF criteria was deliberately falsified or manipulated so as to effect her termination or otherwise adversely alter her employment status. . . . One method of demonstrating manipulation or falsification of evaluation is to produce evidence that a supervisor responsible for assessing her performance displayed ageist animus. Third, a plaintiff can adduce evidence that the RIF is more generally pretextual. . . . Statistical evidence may, in certain circumstances, be relevant to this purpose.

Beaird, 145 F.3d at 1168 citations omitted). Plaintiffs argue that statistical evidence and the use of subjective

criterion in C&E rankings prove that SWBT's nondiscriminatory reason is mere pretext. However, the Court finds that none of plaintiffs' allegations or evidence permits an inference of pretext.

For statistical evidence to be relevant to the issue of pretext, the evidence must show a significant disparity and eliminate nondiscriminatory reasons for such disparity. See *Fallis v. Kerr-McGee Corp.*, 944 F.2d 743, 746 (10th Cir. 1991); *Furr v. Seagate Technology*, 82 F.3d 980, 986-87 (10th Cir. 1996). Plaintiffs' statistical evidence fails to control for nondiscriminatory reasons for disparity. While statistical evidence is an acceptable means of proving discrimination, such "[s]tatistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of pretext." *Doan v. Seagate Tech., Inc.*, 82 F.3d 974, 979 (10th Cir. 1996). Plaintiffs' statistical evidence does not permit an inference of pretext because it fails to eliminate nondiscriminatory explanations for disparate treatment, i.e., that those laid off had lower rankings than those retained. *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1456 (10th Cir. 1994).

Plaintiffs also allege that subjective RIF ranking criteria precludes summary judgment. Plaintiffs rely on *Garrett v. Hewlett-Packard Company*, 305 F.3d 1210, 1218 (10th Cir. 2002), for the proposition that use of subjective criteria in employment evaluations is undisputable evidence of pretext. *Id.* at 1218. In Garrett, the plaintiff's employer held meetings where supervisors ranked each employee from best to worst and promote employees based on these rankings. *Id.* at 1217. The employer admitted that the rankings could

not be verified with objective evidence, other than the opinions of the supervisors. The Tenth Circuit stated that subjective evaluation methods are viewed with skepticism. *Id.* at 1218. Nevertheless, "the use of subjective criteria does not suffice to prove intentional discrimination." *Doan*, 82 F.3d at 978.

The Court must determine whether the employment decision was motived by illegal discrimination. See *Doan*, 82 F.3d at 978 (holding that courts should "not second guess business decisions made by the employer, in the absence of some evidence of impermissible motives.")(citations omitted). Management personnel are allowed to exercise discretion in employment decisions and subjective evaluation criteria do not create an inference of discrimination. *Furr*, 82 F.3d at 987-88. Although defendant's evaluation system may have some bearing on the issue of pretext, plaintiff must still show that defendant's articulated legitimate nondiscriminatory reason is unworthy of belief. See *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262, 1272 (10th Cir. 1988)("We recognize that when management considers individuals for upper level positions, subjective factors must play some role. Their use does not per se constitute discrimination."). Defendant produced affidavits, deposition testimony, and employment evaluations that rationalize the application of subjective ranking criteria. Plaintiffs have provided no evidence that the rankings were inconsistent with SWBT layoff procedures and have provided no evidence of intentional discrimination.

Plaintiffs' disagreement with their managers' assessments is not sufficient to defeat defendant's motion for summary judgment. See *Beaird*, 145 F.3d at

1169 (plaintiff "cannot defeat summary judgment by claiming that she would have been retained if different RIF criteria had been used."); *Fallis*, 944 F.2d at 747 ("even if the jury chose to believe plaintiff's assessment of his performance rather than [the employer's], that choice, standing alone, does not permit a conclusion that [the employer's] version was a pretext for age discrimination.")(citing *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1988)(holding that it is the manager's perception which is relevant to the pretext analysis and no the plaintiff's subjective opinion of her performance)). Plaintiffs have failed to carry their burden to raise a genuine issue of material fact that defendant's articulated legitimate nondiscriminatory reason for its employment decision is pretextual. Accordingly, defendant is entitled to summary judgment on plaintiffs' claim of gender discrimination in the Fall 2002 RIF.

Gender Discrimination under Title VII -- Unequal Pay

Sanders and Coffey allege that SWBT discriminated against them on the basis of gender through disparate pay in violation of Title VII. Plaintiffs assert that, if they produce any evidence that male employees received higher pay than female workers, they are entitled to a trial on this claim for gender discrimination. See *Miller v. Automobile Club of New Mexico. Inc.*, 420 F.3d 1098, 1115 (10th Cir. 2005); *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 409 (10th Cir. 1993)(establishing pay disparity as an element of plaintiff's prima facie case). Defendant argues that the evidence shows that plaintiffs received a salary equivalent to, and in some cases exceeding, that of male counterparts in the C&E organization.

A plaintiff can prove a prima facie case of wage discrimination under Title VII by "showing that she occupies a job similar to that of higher paid males." *Sprague v. Thorn Americas. Inc.*, 129 F.3d 1355, 1363 (10th Cir. 1997)(quoting *Meeks v. Computer Associates International*, 15 F.3d 1013, 1019 (11th Cir. 1994)). If plaintiffs come forward with sufficient evidence to prove a prima facie case of gender discrimination, the burden shifts to the defendant to state a legitimate nondiscriminatory reason for the disparity in pay. Id. If the employer meets this burden, plaintiffs must show that the defendant's stated reason is pretextual. Id. Plaintiffs bear the burden to show that similarly situated male employees received higher pay.

In Miller, the Tenth Circuit held that the employee did not prove a prima facie case of gender discrimination based on unequal pay. 420 F.3d at 1115. The plaintiff in Miller alleged that she performed more duties than her male co-workers but received the same pay. The facts showed that the plaintiff worked more hours than male employees but was also compensated at a higher rate. Plaintiff also argued that the person who replaced her was male and that he received a better salary than plaintiff. The court found that the new employee was hired for a newly created position and, focusing on the duties of the two positions, decided that the new employee was not similarly situated to plaintiff. Id. Miller shows the fact-intensive analysis required to survive summary judgment when a claimant alleges that she received unequal pay. See also *Sprague*, 129 F.3d at 1363 (holding that employee did not prove prima facie case of discrimination based on unequal pay, because job duties between employees differed and

higher paid workers had more education and experience).

The initial burden is on plaintiffs to come forward with a prima facie case, such as to show which other workers were similarly situated and to introduce evidence of unequal pay. *Nulf v. International Paper Co.*, 656 F.2d 553, 557 (10th Cir. 1981). Sanders received greater compensation than then of the fifteen male engineers in her work group. Of the five male engineers who were paid more than Sanders, four had more years of service than Sanders. See *Doan*, 82 F.3d at 979 (holding that similar job titles alone do not satisfy the requirement of similarity between jobs). Sanders' only evidence of unequal pay is the one male coworker, Breitling, who had the same years of service as she did but received a higher salary. While Coffey received compensation equal to three male coworkers [9] at the time that they were promoted in April 2000, the salaries of her male coworkers steadily outgrew her salary over time. Plaintiffs have presented evidence that similarly situated male coworkers received greater compensation.

Defendant has articulated a legitimate nondiscriminatory reason for any disparity in pay. SWBT states that differences in performance between plaintiffs and male coworkers justify pay disparities. According to SWBT, Sanders was given a lower performance rating than Breitling. In addition, Coffey's salary did not rise at the same pace as the salaries of male coworkers because she did not rank as well on performance reviews. For a claim of gender discrimination based on disparate pay, the employer "must merely proffer non-gender based reasons, not

prove them." *Sprague*, 129 F.3d at 1363 (citations omitted).

In light of defendant's articulated legitimate nondiscriminatory reason, plaintiffs "must show that a discriminatory reason more likely than not motivated the employer to pay her less." Id. (citations omitted). It is plaintiffs' burden to show that "there is a genuine issue of material fact as to whether employer's proffered reason is pretextual -- i.e., unworthy of belief." *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995). Plaintiffs argue that defendant did not properly account for years of experience when calculating salaries. Plaintiffs fail to provide evidence, direct or circumstantial, of pretext. The evidence shows that employees in C&E received a range of salaries, and that Sanders and Coffey received pay equal to or greater than male colleagues. Sanders argues that SWBT violated Title VII by paying her less than male coworkers, even though she earned more money than two-thirds of her male coworkers and the one male coworker who earned more based on performance, Breitling, made only $ 195 more than Sanders. Meanwhile, Brooks was earning one of the highest salaries in the group. There is no evidence that SWBT's compensation system intentionally discriminated against women. Plaintiffs do not allege that any supervisor made sexist comments or otherwise revealed intent to discriminate on the basis of gender. Plaintiffs have not provided evidence to raise a genuine issue of material fact that defendant's non-gender based reason for pay disparity is pretextual. After a thorough review of the summary judgment record, the Court finds that defendant's articulated reason for unequal wages is legitimate and not merely pretext for

discrimination. Accordingly, defendant is entitled to summary judgement on the claims of gender discrimination based on unequal pay.

Age Discrimination under the ADEA -- RIF

The ADEA provides in pertinent part that it is "unlawful for an employer ... to discharge any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). ADEA claims based on indirect evidence of discrimination [10] are subject to the McDonnell Douglas burden-shifting framework. See *Beaird*, 145 F.3d at 1165; *Branson*, 853 F.2d at 770 ("Cases brought under the ADEA are subject to the same indirect method of proof used in Title VII cases alleging discriminatory treatment.").

To establish a prima facie case of age discrimination under the ADEA, a plaintiff who is discharged in a RIF must prove that: she is within the protected age group, she was doing satisfactory work, she was discharged despite the adequacy of her work, and there is some evidence the employer intended to discriminate against her in reaching its RIF decision. *Beaird*, 145 F.3d at 1165; see *Pippin v. Burlington Resources Oil and Gas Co.*, 440 F.3d 1186, 1192 (10th Cir. 2006). As to the fourth element, a plaintiff may either show that she was replaced by a younger worker or produce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Branson*, 853 F.2d at 771. "The fourth element may also be shown by circumstantial evidence that a plaintiff was treated less favorably than younger employees." *Jones v. Unisys Corp.*, 54 F.3d 624 (10th Cir. 1995). Permitting

this alternative showing of differential treatment, rather than replacement, accommodates plaintiffs who, in a RIF context, may not have been replaced because their position was eliminated. See *Branson*, 853 F.2d at 771 ("In reduction-in-force cases, plaintiffs are simply laid off and thus incapable of proving actual replacement by a younger employee.").

Similar to the above analysis of plaintiffs' gender discrimination claim arising from the RIF, plaintiffs have established a prima facie case of age discrimination. All three plaintiffs are over forty years old. SWBT terminated the employment of each plaintiff. The summary judgment record contains information suggestive of the fact that plaintiffs were terminated despite the adequacy of their work performances. SWBT retained managers younger than plaintiffs in the Fall 2002 RIF.

Defendant has advanced a legitimate nondiscriminatory reason for its decision to surplus plaintiffs, namely the RIF. Despite plaintiffs' argument to the contrary, an employer has the burden of production, not proof. As SWBT has carried this burden of production, the presumption of intentional discrimination "drops out of the picture." *St. Mary's Honor Ctr.*, 509 U.S. at 510-11. Plaintiffs "bear the ultimate burden of proving both that the employer's asserted reason was pretextual and that the plaintiff's age was the true reason for the challenged employment decision." *O'Connor v. Consolidated Coin Caterers Corp.*, 84 F.3d 718, 719 (4th Cir. 1996)(citing *St. Mary's Honor Ctr.*, 509 U.S. at 516). The factfinder may infer discrimination only if plaintiffs produce evidence that defendant's proffered explanation is pretextual and "unworthy of credence."

Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir.1997).

In support of pretext, plaintiffs have presented statistical evidence that they may have been terminated before younger male counterparts due to a discriminatory motive. The fact that the majority of surplussed managers in Fall 2002 were over forty does not account for the fact that the majority of managers in C&E were over forty. As stated supra, "[s]tatistical evidence which fails to properly take into account nondiscriminatory explanations does not permit an inference of pretext." *Doan*, 82 F.3d at 979.

In the RIF context, plaintiffs must show that SWBT intended to discriminate in disproportionately terminating employees over the age of forty. Plaintiffs fail to carry this burden. The July 2002 transfers do not indicate intent to discriminate on the basis of age. While Coffey alleges that SWBT hired Starwalt to replace her, it is undisputed that Starwalt was a July 2002 transfer and Coffey was terminated in December 2002. Both Starwalt and Coffey were 45 years old in 2002. The evidence does not support an inference that plaintiffs were replaced rather than their positions terminated. Further, all managers were older than Coffey and the transferees were either older or less than two years younger than Sanders. See *Munoz v. St. Mary-Corwin Hopsital*, 221 F.3d 1160, 1166 (10th Cir. 2000)(holding that a two-year age difference is insignificant). "[A] prima facie case of age discrimination requires evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion, and this inference of age discrimination cannot be drawn from the

replacement of one worker with another worker insignificantly younger." Id. (quoting *O'Connor*, 517 U.S. 308, 116 S. Ct. 1307, 134 L. Ed. 2d 433; *International Bhd. of Teamsters, v. United States*, 431 U.S. 324, 358, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977))(internal quotation marks omitted).

Coffey's allegation of discriminatory intent is undermined by the fact that the same supervisor who promoted her, terminated her. See *LeBlanc v. Great American Ins. Co.*, 6 F.3d 836, 847 (1st Cir. 1993)(noting that it is unlikely that the person who hired the plaintiff and who was nearly the same age would develop an aversion to older employees less than two years later when the same person terminated plaintiff). Harris promoted Coffey in 2000 and terminated her in 2002. An inference of discriminatory animus is unwarranted.

Plaintiffs attempt to show pretext by questioning the subjectivity of defendant's RIF ranking system and by submitting the fact that a disproportionate number of employees over forty were terminated in Fall 2002. *Garrett*, 305 F.3d at 1218 (finding that defendant's ranking system is to be viewed with skepticism). However, the use of subjective criteria for RIF decisions does not suffice to prove intentional age discrimination. *Doan*, 82 F.3d at 978. "Pretext exists when an employer does not honestly represent its reasons for terminating an employee." *Miller v. Eby Realty Group LLC*, 396 F.3d 1105, 1111 (10th Cir. 2005). Plaintiffs have not offered any evidence that their rankings were inconsistent with SWBT layoff procedures. Plaintiffs' disagreement with their

managers' assessments is not sufficient to defeat summary judgment.

Plaintiffs fail to show that SWBT's legitimate nondiscriminatory reason is pretext for discrimination. "Pretext can be shown by such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons." *Morgan*, 108 F.3d at 1323 (quotations and citation omitted). Plaintiffs can prove pretext by showing that: their termination was not in accordance with the RIF criteria allegedly used; their evaluations under the RIF criteria was falsified or manipulated; or the RIF itself was pretextual and the employer was not really reducing its workforce. See *Beaird*, 145 F.3d at 1168. However, "[an employer] may chose to conduct its RIF according to its preferred criteria of performance . . . and we will not disturb that exercise of defendant's business judgment." Id. at 1169. See also *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1403-04 (10th Cir.1988)("This court will not second guess business decisions made by employers, in the absence of some evidence of impermissible motives."). After thorough review of the summary judgment record, the Court finds no evidence that defendant's business decision to surplus plaintiffs was so "idiosyncratic" or "questionable" as to allow a reasonable factfinder to find discrimination. *Beaird*, 145 F.3d at 1169. Under these circumstances, "[t]here is simply no inference of foul play about [the employer's] choice." Id. Defendant is entitled to summary judgment on plaintiffs' ADEA claims.

Brooks' Fraud Claim

Brooks does not dispute defendant's statute of limitations defense to her claim of fraud. Accordingly, Brooks' fourth claim [11] is dismissed. Underlying Brooks' fourth claim is her allegation that defendant perpetuated a fraud against her when, in March 2000, Caviness told her that Project Pronto was expected to last from three to five years. Project Pronto was cancelled less than two years later. According to Brooks, this misrepresentation induced her to transfer to the Oklahoma C&E organization. The statute of limitations for a common law fraud claim is two years and accrues when a plaintiff, in the exercise of reasonable diligence, knew or should have known about the fraud. Okla. Stat. tit. 12, § 95(A)(3); *McCain v. Combined Communications Corp. of Oklahoma. Inc.*, 1998 OK 94, 975 P.2d 865, 866-67 (Okla. 1999). As of October 2001, Brooks knew Project Pronto would be cancelled. Her fraud claim was not filed until November 6, 2003. Dkt. # 2. Accordingly, Brooks' fraud claim is time barred.

IV.

IT IS THEREFORE ORDERED that defendant's Motion for Summary Judgment (Dkt. # 81) is granted. A separate judgment is entered herewith. Defendant's Motion in Limine (Dkt. # 147), plaintiffs' Motion in Limine (Dkt. # 151), and defendant's Motion for Extinsion of Time (Dkt. # 171) are moot.

DATED this 5th day of September, 2006.

CLAIRE V. EAGAN, CHIEF JUDGE

UNITED STATES DISTRICT COURT

Footnotes

1 Southwestern Bell Telephone Company, were terminated as party defendants on July 27, 2006. Dkt. # 152.

2 Group A qualities are described as: unanimous agreement regarding the employee's performance; everyone knows and admires this person's work; a model leader; consistently strong performer; outstanding accomplishments, and no glaring weakness.

3 Group B qualities are described as: meets key objectives; has many significant achievements; achieves substantial results relative to others; able to work independently; solid leadership/interpersonal skills; and effective contributor as both an individual and team player.

4 Group C qualities are described as: inconsistent performance, failed to meet some minor objectives, but not critical ones, support/direction regularly needed from peers or manager; requires more time to accomplish tasks/ objectives compared to others; may have occasional difficulties dealing with peers and subordinates (interpersonal skills); overall contribution is less than others as an individual and/or as a team player.

5 This group includes Starwalt, whom Coffey suggests was immune from the Fall 2002 RIF after his transfer to C&E in August 2002.

6 A second-level manager, Rick Griffith, transferred to first-level manager in keeping with SWBT's reorganization procedures. Dkt. # 81, Ex. 3, McNeely Affidavit; id., Ex. 10, Saenz Affidavit. Griffith's transfer resulted in a net loss of 22 first-level managers.

7 Ten managers, including Brooks and Coffey, were involuntarily terminated. Eight managers, including Sanders, were able to locate positions within SWBT. Three other managers, including Leedell Wheeler, voluntarily terminated their employment to receive severance benefits. Two female managers who were not "at risk" voluntarily transferred positions, thereby saving the jobs of others.

8 In an abundance of caution, SWBT defended against a claim of hostile work environment because the subject was broached in plaintiffs' depositions. Plaintiffs did not claim hostile work environment in their EEOC filings, nor in their complaint, and are, accordingly, barred from raising the claim now.

9 The three workers are Dewayne Hendricks, Michael Roush, and Steve Parrot.

10 The only evidence of age discrimination that might be direct is Sanders' claim of Wooten's alleged concession that Sanders was being surplussed because of her age. Given the different versions of this conversation between Wooten and Sanders, this evidence is at most circumstantial. See *Danville v. Regional Lab Corp.*, 292 F.3d 1246, 1249 (10th Cir. 2002).

11 Plaintiffs' third claim was dismissed in the January 28, 2004 Opinion and Order. Dkt. # 14.

Filed:11/24/08
No. 06-5199
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JAMIE K. SANDERS, an individual; DENISE J. COFFEY, an individual; KARIE H. BROOKS, an individual,
Plaintiffs - Appellants,
v.
SOUTHWESTERN BELL TELEPHONE, L.P., a Texas corporation; SOUTHWESTERN BELL COMMUNICATIONS,
Defendants - Appellees.

Before TACHA, McKAY, and TYMKOVICH, Circuit Judges.

ORDER

Appellant's petition for rehearing en banc is before the court. The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition is denied.